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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 13, Original.

EX PARTE: IN THE MATTER OF EPHRAIM SIMON, PETITIONER.

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI, AND MOTION FOR LEAVE TO FILE SAME.

HENRY L. LAZARUS,
Counsel for Petitioner.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 28735

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

EX PARTE: IN THE MATTER OF EPHRAIM SIMON, PETITIONER.

Motion for Leave to File Petition.

Ephraim Simon, a citizen of the State of Louisiana, now in the custody of the United States marshal under orders of the honorable the Circuit Court of the United States for the Eastern District of Louisiana, and restrained of his liberty for an alleged violation of an injunction issued by the United States Circuit Court for the Eastern District of Louisiana, on an original bill filed in said court by the Southern Railway Company, enjoining the said Ephraim Simon from enforcing or executing a judgment in his favor rendered by the State courts of Louisiana, moves for permission to file his petition in this court for relief by *habeas corpus* from further detention and restraint under an order of commitment entered in a cause by a court without jurisdiction and in direct violation and disregard of section 720 of the Revised Statutes of the United States.

HENRY L. LAZARUS,
Counsel for Petitioner.

WASHINGTON, D. C., *November* 18, 1907.

[Endorsed:] No. —. Supreme Court of the United States. *Ex parte:* In the matter of Ephraim Simon, petitioner. Motion for leave to file petitions for writs of *habeas corpus* and certiorari. Filed —— —. —— ——, clerk. Lazarus, Michel & Lazarus, attorneys for petitioner, 830 Common street, New Orleans.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1907.

Ex Parte: In the Matter of EPHRAIM SIMON, *Petitioner.*

Petition for Writs of Habeas Corpus and Certiorari.

To the Honorable the Supreme Court of the United States:

Your petitioner, Ephraim Simon, a citizen of the State of Louisiana and a resident of the parish of Orleans, State of Louisiana, respectfully shows that he is unlawfully held in custody, imprisoned, and restrained of his liberty by the marshal of the United States for the Eastern District of Louisiana, at New Orleans, the said marshal acting under and by virtue of the authority of the judge of the United States Circuit Court for the Eastern District of Louisiana.

Your petitioner further states that in a proceeding pending in the United States Circuit Court for the Eastern District of Louisiana, entitled Southern Railway Company *versus* Ephraim Simon, No. 13300 of the docket of said court, an injunction was issued upon the application of complainant in said cause, enjoining petitioner from issuing execution upon a judgment obtained by him in the State courts of Louisiana, or attempting thereunder to seize any property, movable or immovable, of the Southern Railway, complainant, or attempting in any manner to enforce the same; that the honorable the Circuit Court of the United States for the Eastern District of Louisiana, being without power or authority to issue said injunction and the issuance thereof, being in disregard of the statutory prohibition of the United States, was inoperative and void, and therefore without effect, and your petitioner had the right to pursue his legal remedies in the courts of his State, which were first seized of jurisdiction and which entitled him in the pursuit of

said rights to the enforcement of his judgment; that petitioner caused to be issued his writ of execution, and in furtherance thereof the Honorable W. B. Sommerville, one of the judges of the Civil District Court for the Parish of Orleans, State of Louisiana, and who had exclusive jurisdiction of the judgment obtained by your petitioner against the Southern Railway Company in said court, directed, under his signature and the seal of said court, the issuance of a writ of garnishment directing the seizure of the property and effects of the Southern Railway Company, the defendant in said cause; that thereupon the said Southern Railway Company caused to be issued by the United States Circuit Court for the Eastern District of Louisiana a summons, directed to your petitioner, to show cause why he should not be punished for contempt for breaching the injunction of said court restraining your petitioner from the enforcement of his judgment against the Southern Railway Company obtained by him in the State courts of Louisiana; that thereupon your petitioner made due return to said summons, and, disclaiming any intention of disrespect in the disobedience of the writ for which he was sought to be held in contempt, he challenged and denied the power and jurisdiction of the court to issue the writ, and contended that its violation did not constitute a contempt of the authority of said court; and that thereupon, after hearing the return to the said summons, the said honorable United States Circuit Court, acting through Honorable E. D. Saunders, presiding judge, committed your petitioner for contempt for the alleged violation of the injunction aforesaid; all of which will more fully and at large appear by reference to the record in said cause, hereto attached and made part hereof, embracing the exemplification of record of the State court, the summons to show cause for the breach of the injunction, the return thereon, and the action of the court upon said summons and return.

Your petitioner further states and alleges, as he is advised, that the honorable the Circuit Court of the United States for the Eastern District of Louisiana had no jurisdiction or lawful authority to cause the arrest of your petitioner, nor to proceed against him in manner and form aforesaid, and that the said pretended process, arrest, order, judgment, and warrant issued in pursuance thereof, whereby your petitioner was committed to the custody of the said United States marshal of said United States Circuit Court for the Eastern District of Louisiana, and whereby and in pursuance of the authority of which he is held in custody of the said United States marshal and imprisoned and restrained of his liberty, as aforesaid, were and are, each and all of them, wholly without authority of law, in violation of law and of the just rights of your petitioner, and void.

Your petitioner further represents that, as appears by a certified copy of the record hereto annexed, he instituted his suit in the Civil District Court for the Parish of Orleans for indemnification and recovery of damages suffered and sustained by him in consequence of a breach of contract on the part of said Southern Railway Company; that the said Civil District Court is a court of general jurisdiction organized under the constitution and laws of the State of Louisiana; that under the constitution and laws his cause instituted against the Southern Railway Company was duly allotted to Division "D" of said court, presided over by the Honorable W. B. Sommerville, who, under and by virtue of the constitution and laws of the State of Louisiana, is charged with exclusive jurisdiction of said cause from its inception until its final determination; and that the division of said court to which this cause was allotted in accordance with law was seized of jurisdiction of said controversy *ratione materiæ et personæ;* that, after service of due process in accordance with the laws of the State of Louisiana, the cause came on regularly to be heard and was tried before the Hon-

orable W. B. Sommerville, presiding judge, and a jury duly empaneled and sworn, and in due course of procedure a verdict was rendered in favor of your petitioner, and upon said verdict, in accordance with the laws of Louisiana, a judgment was entered which, after the lapse of the legal delays provided for by statute, was duly signed and made executory; that thereupon said Southern Railway Company, by its independent suit, invoked the jurisdiction of the United States circuit court on the ground of diverse citizenship, and, reciting in its bill of complaint various causes for the annulment of said judgment, applied for and obtained a temporary injunction, directed against your petitioner, from issuing execution upon said judgment or attempting thereunder to seize any property, movable or immovable, of the complainant, the Southern Railway Company, or attempting in any manner to enforce the judgment which your petitioner had obtained in the State court; that the jurisdiction of the United States circuit court was, by demurrer and plea, as well as by answer, challenged and denied, and that the right to issue the writ of injunction enjoining the execution by petitioner of his judgment so obtained by him in the State court was specially and particularly pleaded as being in derogation of the fundamental law and in violation of section 720 of the Revised Statutes of the United States, which lays its prohibition upon all courts of the United States from issuing execution to stay proceedings in any court of the State; that, notwithstanding said prohibition, the said injunction has been held in operation against your petitioner by said United States circuit court, and because of its violation proceedings for contempt were taken, as hereinbefore recited, and your petitioner held in custody under the order of said United States circuit court for breach of the injunction which it was without power or jurisdiction to issue; all of which will more fully and at large appear by a certified copy of the record of the United States circuit court in the case entitled Southern Railway

Company *versus* Ephraim Simon, No. 13300 of the docket of said court, hereto attached and made part hereof.

Wherefore petitioner prays that a writ of *habeas corpus* may be issued out of and under the seal of this honorable court, to be directed to the said United States marshal of the Circuit Court of the United States for the Eastern District of Louisiana, commanding him to have the body of your petitioner, together with return of the date and cause of his detention, before this honorable court on a day to be designated therein, and that a writ of certiorari issue, directed to the said judges of the United States Circuit Court for the Eastern District of Louisiana, and commanding them to certify and send to this court, on a certain day to be therein designated, a full and complete transcript of the process, record, and proceedings by and before them touching the matter of your petitioner's said arrest, detention, and imprisonment; and that your petitioner may have such other or full and adequate relief in the premises as to this court may seem appropriate, and that he may be discharged from said custody and imprisonment; and your petitioner prays for all further and necessary orders in the premises, and for general relief.

EPHRAIM SIMON,
Petitioner.
HENRY L. LAZARUS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

Ex Parte: In the Matter of EPHRAIM SIMON, *Petitioner.*

Petition for Writs of Habeas Corpus and Certiorari.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans, ss:

EPHRAIM SIMON, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated to be on his information and belief, and as to those matters he believes it to be true.

EPHRAIM SIMON.

Subscribed and sworn to before me this 16 day of November, 1907.

[Seal Henry J. Carter, United States Commissioner, Eastern District of Louisiana.]

H. J. CARTER,
United States Commissioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. ——.

Ex Parte: In the Matter of EPHRAIM SIMON, *Petitioner.*

Petition for Writs of Habeas Corpus and Certiorari.

On consideration of the petition of Ephraim Simon and on motion of Henry L. Lazarus, of counsel for the petitioner,

It is now here ordered that the judges of the Circuit Court of the United States for the Eastern District of Louisiana show cause before this court on Monday, the — day of ——, A. D. 19—, at 12 o'clock, noon, or as soon thereafter as

counsel can be heard, why a writ of *habeas corpus* and a writ of certiorari should not issue therein, to the end that the petitioner may be discharged from custody, or that he may have such other or further relief as shall seem just.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. ——.

Ex Parte: EPHRAIM SIMON, *Petitioner.*

On consideration of the petition filed by Mr. Henry L. Lazarus, of counsel, in behalf of the petitioner, it is considered, ordered, and adjudged by this court that a writ of *habeas corpus* be issued, directed to the marshal of the United States for the Eastern District of Louisiana, commanding him to have the body of the said Ephraim Simon, with the day and cause or causes of his detention, before this court on the — day of ——, 19—, to do, receive, and submit to all and singular those things which the court shall consider concerning him in this behalf, and to have then and there this writ, with his doings thereon.

And it is further ordered by this court that a writ of certiorari do issue, to be directed to the judges of the Circuit Court of the United States for the Eastern District of Louisiana, requiring and commanding them that they do send, under the seal of the said United States circuit court, a full, true, and complete transcript of the proceedings had in said court in said cause, together with all things touching the same, to this court on the — day of ——, 19—.

And it is further ordered that all proceedings in said court in this case be stayed until the further order of this court made in the premises.

[Endorsed:] No. —. Supreme Court of the United States. *Ex parte:* In the matter of Ephraim Simon, petitioner. Petition for writs of *habeas corpus* and certiorari. Filed ——. —— ——, clerk. Lazarus, Michel & Lazarus, attorneys for petitioner, 830 Common street, New Orleans.

EXHIBIT TO PETITION.

UNITED STATES OF AMERICA.

CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

No. 13300.

SOUTHERN RAILWAY COMPANY

versus

EPHRAIM SIMON.

Harry H. Hall, Esquire, Solicitor for Complainant.

Lazarus, Michel & Lazarus and David Sessler, Esquires, Solicitors for Defendant.

TRANSCRIPT OF RECORD.

CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

No. 13,300.

SOUTHERN RAILWAY COMPANY

vs.

EPHRAIM SIMON.

INDEX.

	Original.	Print.
Bill of complaint	1	1
Transcript of removal from civil district court, marked Exhibit "A".	8	6
Citation, issued to defendant through Secretary of State	15	11
Default	16	12
Verdict of jury	16	12
Judgment for plaintiff	17	12
Exhibit "B"	19	14
Restraining order issued to Ephraim Simon	20	14
Marshal's return on citation issued to Ephraim Simon	21	15
Subpœna in chancery issued to Ephraim Simon	22	15
Marshal's return on subpœna in chancery issued to Ephraim Simon.	23	16
Marshal's return on copy of order on bill of complaint	24	16
Orders continuing rule for injunction	25	17
Demurrer	26	18
Deposition of Hon. Walter B. Sommerville	28	19
Ephraim Simon	29	20
Henry L. Lazarus	35	23
Letter attached to deposition of H. L. Lazarus, marked Lazarus 1	40	27
Letter attached to deposition of H. L. Lazarus, marked Lazarus 2	40	27
Letter attached to deposition of H. L. Lazarus, marked Lazarus 3	41	28
Deposition of Gustave Lehmann, Sr.	42	28
Gustave Lehmann, Jr.	43	29
Herman Michel	44	30
Herman Weil	45	31
Leon Schwartz	46	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 19, 1907.

	Original.	Print.
Deposition of Adolph Katz	47	32
William Adler	48	32
Charles A. Morgan	49	33
Eugene Ellis	50	33
Charles H. Culbertson	51	34
G. Wagatha	52	35
J. H. Curtin	53	35
S. E. Worms	54	36
Felix Levy	55	37
Dr. C. A. Gaudet	56	37
Eva E. Simon	58	38
Hearing and continuance of rule for injunction	60	40
Order continuing rule for injunction	61	40
Motion and order continuing case	62	41
Order continuing application for a preliminary injunction	63	41
Order continuing rule for injunction	64	42
Order continuing rule for injunction	65	42
Appearance	66	43
Order continuing rule for injunction	67	43
Order continuing rule for injunction	68	44
Motion and order continuing rule for injunction	69	44
Affidavit of Dr. E. D. Martin, marked Exhibit "B" 1	70	45
F. E. Shumate, marked Exhibit "C" 2	71	45
Walter Kennedy, marked Exhibit "D" 3	73	47
Walter Kennedy, marked Exhibit "E" 4	76	48
Dr. E. Denegre Martin, marked Exhibit "G" 5	77	49
Dr. E. Denegre Martin, marked Exhibit "F" 6	78	50
J. C. Andrews, marked Exhibit "H" 7	79	50
H. H. Hall, marked Exhibit "I" 8	80	51
W. W. Finley, marked Exhibit "J" 9	83	53
Charter and amendments of the New Orleans and San Francisco Railroad Company, now the New Orleans Terminal Company, marked Exhibit "X"	84	54
Affidavit of Ephraim Simon	99	62
Submission of rule for injunction	101	63
Note of evidence	102	64
Note of evidence	105	65
Memorandum of reasons	108	66
Order granting preliminary injunction	110	67
Order appointing special master	111	68
Acceptance of appointment as special master	112	69
Bond for injunction	113	69
Injunction issued to Ephraim Simon	114	70
Marshal's return on injunction issued to Ephraim Simon	115	71
Motion to set demurrer for hearing	116	71
Motion to set demurrer for hearing	117	71
Stipulation as to bond	118	72
Order overruling demurrer	119	72
Order correcting order of December 15, 1906	120	73
Plea	121	73
Replication to plea	126	76
Motion to set plea for hearing	127	77

	Original.	Print
Hearing and order overruling plea and allowing defendant until first Monday in August to further plead or answer	128	77
Answer	129	77
Replication	140	83
Motion to punish for contempt and documents attached	141	84
Marshal's return on motion to punish for contempt	149	88
Return to rule for contempt	150	89
Exhibit A to E. Simon's return to rule for contempt	154	91
Proceedings and note of evidence on behalf of complainant	162	98
Proceedings and note of evidence on behalf of defendant	165	99
Reasons for judgment on motion of complainant to have defendant punished for contempt	167	100
Hearing and judgment upon motion of complainant to have defendant punished for contempt	171	102
Marshal's return	172	103
Certificate	173	103

1 *Bill of Complaint. Filed February 6th,* 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

Circuit Court of the United States, Fifth Circuit, Eastern District of Louisiana. In Equity.

To the Honorable the Judges of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana:

The Southern Railway Company, a corporation duly organized and existing under and by virtue of the Laws of the State of Virginia and a citizen of the State of Virginia, having its principal office in said State in the City of Richmond, and being a resident of the said City within the meaning of the Statute defining the jurisdiction of this Court, brings this its Bill of Complaint against Ephraim Simon, a resident of the City of New Orleans, State of Louisiana and a citizen of the said State.

And, thereupon, your Orator complains and says:

1. Your Orator is, and at all times mentioned in this Bill of Complaint was a corporation duly organized and existing under and pursuant to the Laws of the State of Virginia and is a citizen of the State of Virginia, and is and was at all times mentioned in this Bill of Complaint fully empowered to operate a line of Railway in said State of Virginia; in the State of Mississippi, and other States, but not in the State of Louisiana.

2. Ephraim Simon is and at all times mentioned, in said Bill of Complaint was a resident of the City of New Orleans, and a citizen of New Orleans in the State of Louisiana.

3. That, on or about the 8th, of February, 1904, the said Ephraim Simon was a passenger upon one of your Orator's trains and, when in the vicinity of York in the State of Alabama, there
2 occurred between the train upon which the said Simon was a passenger and a train of the Alabama Great Southern Railway Company, a collision, in which collision both ankles of the said Simon were Slightly sprained he sustaining no other or further injury;

That notwithstanding the insignifiance of the said sprains, said Simon presented to your Orator an exaggerated and untrue statement of his injuries, falsely claiming that he had been damaged, by reason of the said collision in the full sum of Five Thousand Dollars, of which amount he demanded payment of your Orator in full and complete satisfaction of all claims against it;

That your orator had said Simon's injuries examined by a surgeon who pronounced them slight, and that, thereupon, your Orator offered to the said Simon Three Hundred and Fifty Dollars, in full compensation of his said injuries, and claim;

That the said Simon refused to accept said $350.00 but considered and discussed the acceptance of $750.00, which was not agreed to by Plaintiff's representative, and the matter was then temporarily left in abeyance with a view of having said Simon modify his demand, it being understood that negotiations were still pending and would probably result in an agreement of settlement;

4. That said Simon, however, instead of terminating said discussion and attempted adjustment by a refusal, but leaving your Orator in the belief that he was still considering and would submit a modified offer of settlement, surreptitiously, and without the knowledge of your Orator, entered against it in the Civil District Court for the Parish of Orleans, No. 74869 of its docket, a suit for damages sustained by him in the collision aforesaid, and instead of suing for the Seven Hundred and Fifty Dollars amount of suggested compromise or the Five Thousand Dollars the amount of his claim as made out and presented originally, he claimed in said suit to have sustained damages in the full sum of Thirteen Thousand three hundred and forty-eight Dollars, falsely and fraudulently pretending that he had been injured in that sum, by reason of the collision aforesaid. Your Orator avers that he sets out the damages thus falsely alleged
3 to have been sustained by him as follows:

Physical and mental anguish	$5000.00
For loss of profit to his business	4000.00
For deterioration of stock	3000.00
For extra cost of manufacturing stock	1000.00
For nurses, medicines, etc	250.00
For physician's services	98.00
	$13,348.00

5. That said suit was entered in the Civil District Court for the Parish of Orleans, and a citation issued therein and was served on the Assistant Secretary of the State of Louisiana on December 3rd, 1904, said Simon maintaining that your Orator was a Foreign Corporation doing business in the State of Louisiana, which had not filed in the office of the Secretary of State a written declaration setting forth the locality of its domicile and the place or places in this State where it is doing business, and had failed to name an agent upon whom process might be served, and claiming that, by reason thereof and by virtue of Act No. 54 of 1904 of the Acts of the General Assembly of the State of Louisiana, he was, in such case and by reason of such omissions, justified in serving said citation on the said Secretary of State.

6. Your Orator avers that it is not a Foreign Corporation doing business in the State of Louisiana, and that none of its lines of Railway enter or traverse any part of the said State.

And your Orator avers that the attempted service of said citation upon the Secretary or Assistant Secretary of State of Louisiana, was not a citation upon your Orator, and is absolutely null and void for the purpose of bringing it under the jurisdiction of the said Civil District Court.

Your orator avers that even if it could be construed to have been the intention of the General Assembly of the State of Louisiana, in enacting said Act 54 of 1904, to permit suit to constrain a Foreign Corporation engaged, as is your Orator, in Interstate Commerce, to be impleaded in the Courts of this State, when it is not transacting business within the limits thereof and has no agent therein, such an Act would be an attempted regulations of Interstate Commerce and in violation of the Constitution of the United States.

4 And your Orator further avers that any judgment rendered, upon such attempted citation, would be, if rendered without appearance of the defendant, a judgment without due process of law, and consequently, in violation of said Constitution.

7. That on the 10th day of January, 1905, said Simon caused to be entered a default in the above referred to proceeding and, on the 16th day of January, 1905, caused to be impaneled a jury, and caused to be confirmed said default, and fraudulently caused to be entered by said jury a verdict of $13,348.00 (Thirteen Thousand Three Hundred and Forty Eight Dollars), against said Orator which verdict was subsequently embodied in a judgment of the said Civil District Court.

8. Now your orator avers that in confirming the said default, the said Ephraim Simon was guilty of subterfuge and fraud in claiming and adducing testimony to the effect that he had sustained damages in the sum of $13348.00 as above detailed, he knowing full well that his claim, as originating with himself and before discussion or suggestion of compromise was for Five Thousand Dollars, the total damage, which he pretended to have sustained or suffered by reason of said collision, and he having been apparently willing to accept, after discussion, one half of that sum.

And your orator avers that the claim for loss of profit, deterioration of stock, extra cost of manufacturing stock, are claims that said Simon well knew and knows were and are fraudulent, fictitious and utterly untrue, and even if true would be such remote and consequential damages as could not be recovered.

9. Your Orator avers that it has never received from the Secretary of State the above referred to citation issued out of said suit No. 74869 of the Civil District Court for the Parish of Orleans, nor was it advised, nor had it any knowledge of the pendency of said proceedings, until after the rendition of said judgment.

That immediately upon receipt of said advice, your Orator's Assistant General Counsel left the City of Washington, and immediately proceeded to the City of New Orleans, to investigate

5 the matter of this proceeding, and thereupon promptly retained Counsel to bring this Bill of Complaint.

10. Your Orator avers that the verdict of the Jury and the judgment of the Civil District Court, as above set out, are unconscionable

as having been rendered fraudulently and upon false testimony, and without due and proper citation or notice to your Orator; and that it would be against good conscience to allow said judgment to be used to extort money that is not owing from your Orator, which has no remedy at law in the premises and which has a complete meritorious defense to the claim on which the said judgment is based.

11. And your Orator avers that it was prevented from availing itself of its defense to the cause of action embodied in said proceeding by the accident or failure of its not receiving from said Secretary of State any citation or notice of said proceeding, and that it has been without negligence either of itself or its agents in the premises.

Your Orator avers that this Court has plenary jurisdiction to restrain the enforcement of such judgment, to which your orator has a meritorious defense, which it was prevented by fraud and accident, unmixed with its own negligence from adducing.

12. Your Orator avers that unless prevented and restrained, the said Ephraim Simon will attempt to collect said fraudulent judgment and will cause to be issued thereon, out of the Civil District Court, a writ of *fieri facias*, under and by virtue of which he will attempt to seize your Orator's property and thereby cause it continuous and irreparable injury.

And your Orator avers that it is informed and verily beli-ves that such action is about to be taken by the said Ephraim Simon, and that it is entitled to a writ of injunction and restraining order to prevent such action.

Your Orator annexes & makes part of this bill a copy of the said record in the State Court & a letter from the Secretary of State marked Exhibit "A" & Exhibit "B."

6 In consideration whereof and for as much as your Orator is remediless in the premises and by the strict rules of the common law, and is only relievable in a Court of Equity where matters of this kind are cognizable, and relievable, your Orator therefore prays that the said Ephraim Simon who is Plaintiff, as aforesaid, in said action at law, entitled Ephraim Simon *vs.* the Southern Railway Company No. 74869 Civil District Court for the Parish of Orleans, his Counselors, Attorneys, Solicitors or agents may be restrained by an injunction issuing out of this Court from further proceeding against your Orator, under the said suit and judgment, or from issuing execution thereon, or attempting thereunder to seize any property movable or immovable of your Orator, or in any manner attempting to enforce the same.

May it please your Honors to grant unto your Orator not only said writ of injunction, but also a writ of subpœna of the United States of America, issued out of and under the seal of this Honorable Court, directed to said Ephraim Simon therein and thereby commanding him on a certain day therein to be named, and under a certain penalty to be there and answer all and singular, (but not under oath, which is hereby expressly waived), the premises and to stand to, perform and abide by such order direction and decree as may be made against him in the premises and that the said injunction be made perpetual, and for such further general and equi-

table relief as may seem meet and agreeable to equity and good conscience.

And your Orator as in duty bound will ever pray & etc.

(Signed) SOUTHERN RAILWAY CO.,
" By H. H. HALL, *Att'y.*
" HARRY H. HALL, *Solicitor.*

7 UNITED STATES OF AMERICA, *District of Columbia:*

A. B. Andrews, being duly sworn, deposes and says that he is the First Vice President of the Southern Railway Company, complainant herein; that he has read the foregoing Bill of Complaint, and that the same is true to his knowledge, in so far as the citizenship and conduct of business of complainant is stated; and that in so far as the other matters alleged, he has no personal knowledge as to same beyond the official records and official statements made to him, but that they are true to the best of his information and belief.

(Signed) A. B. ANDREWS.

Sworn to and subscribed before me, this the 31st day of January, 1905.

(Signed) PEARCE HORNE,
[SEAL.] *Notary Public.*

Let defendant show cause on Saturday February 11th, at 11 o'clock A. M. before this Court why a preliminary injunction should not issue herein & in the meantime let a temporary restraining — issue herein restraining & forbidding the said defendant from proceeding against Complainant under said suit & judgment or attempting to enforce the same.

New Orleans, Feb'y 6th, 1905.

(Signed) CHARLES PARLANGE,
U. S. Judge.

8 *Transcript of Removal from Civil District Court Marked Exhibit "A." Filed Feb. 6, 1905, with Bill.*

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

Petition. Filed December 1st, 1904.

Civil District Court, Division "D."

No. 74869.

EPHRAIM SIMON
vs.
SOUTHERN RAILWAY CO.

To the Honorable the Judges of the Civil District Court for the Parish of Orleans:

The Petition of Ephraim Simon a citizen of the State of Louisiana and a resident of the parish of Orleans, with respect represents:—

That the Southern Railway Company, a corporation organized under the laws of the State of Virginia, and doing business in the City of New Orleans, is justly and truly indebted unto your petitioner in the sum of Thirteen thousand three hundred forty eight ($13,348.00) Dollars, with legal interest thereon, from judicial demand, for this, to-wit:

That your petitioner on the 8th day of February 1904, purchased and paid for a first-class ticket for passage, entitling him to safe transportation from Selma, Alabama, to Meridian, Mississippi; that, under the regulations of the defendant company, in the operation and the movement of its trains, your petitioner boarded Train No. — leaving the town of Selma, on Monday, February, 8th, 1904, at about the hour of 4:45 P. M.; that said Company operates a single track between Selma and Meridian, with all neces-

9 sary turn-outs and sidings, and when the movements of the trains are intelligently and carefully directed, it insures to the travelling public reasonable safety in transportation that the said Southern Railway Company is a system of railways embracing, within its control and direction, the Alabama Great Southern Railway Company, being a subordinate part of the system known as the Queen & Crescent System,—and all of which are under the immedite direction and control of the management of the said Southern Railway System.

Petitioner further represents that on the 8th, of February, 1904, while he was a passenger on one of the trains of the said Southern Railway System, as aforesaid, and without his fault, but through the gross and criminal negligence of the officers and employees of the said Southern Railway System and its subordinate Companies, in their failure to take all reasonable and proper precautions to avoid injuries resulting from collisions or other causes, and in their failure to protect and guard the safety of the passengers patronizing said system, a collision occurred at or near the town of York, in the State of Alabama, between the hours of 7:00 and 8:00 P. M., which collision resulted disastrously to your petitioner, inflicting upon him great personal injuries, and financial losses in consequence thereof, as hereinafter more particulariy recited.

Petitioner represents that he is a merchant and manufacturer doing business in the City of New Orleans; that, by his own independent efforts, he had established a business, which, in its results, was profitable; that he does his own purchasing; that he directs and supervises, personally and exclusively, his manufacturing, and, at regular intervals, personally solicits from the trade in neighboring states their accounts and orders for the seasons' goods; that, in his solicitation of business, he exhibits to the trade the various styles of the seasons for which he solicits their orders, and, having the unmanufactured material on hand, he directs and supervises the manufacture of the goods, as ordered.

Petitioner further represents that the business for the spring trade is sought after and solicited in the early winter months of the year; that it is necessary, in order to be prepared to accept and fill orders, samples of which are exposed to the trade, that a large stock of unmanufactured merchandise or raw material should be purchased in advance or held in stock for manufacturing purposes, as orders are received.

Petitioner represents that in pursuance of his business customs, and the customs pursued by manufacturers engaged in the same line of business as that carried on by your petitioner, after having purchased a stock of raw material, as aforesaid, with a sample of the styles prepared for the Spring and Summer trade of 1904, as aforesaid, your petitioner prepared for and already, in fact, began his spring trip among the trade with whom he had previously dealt, and with a view of enlarging the business conducted by him, in soliciting orders from others dealing in his manufactured product.

That your petitioner's business covered a large territory embracing the states of Tennessee, Alabama, Georgia, Arkansas, Mississippi, Louisiana and Texas; that he left New Orleans early in January 1904, going directly to the town of Alexandria, Louisiana, and that on said trip your petitioner visited Alexandria, Shreveport and Monroe, Louisiana; Marshal, Texas; Memphis, Tennessee; Little Rock and Pine Bluff, Arkansas; Macon, Columbus and Augusta, Georgia; and Mobile, Montgomery, Greenville and Selma, Alabama; that, leaving Selma, Alabama, on the night of February 8th, 1904, your petitioner was on his way to Meridian, where he had customers awaiting his arrival and from whom petitioner would, as he believes,

have secured orders and an opportunity to solicit further orders from others than his regular customers, for the Spring and Summer trade; that, in consequence of the accident and of the injuries received, your petitioner was deprived of the advantage of visiting and soliciting from his trade in other localities, their business for the Spring and Summer, of 1904, and the orders which he believes he would have secured, based upon past business with said various firms, and, more particularly, those residing and doing business in Meridian,
Summit, Vicksburg, Ellisville, Brookhaven, Greenwood,
11 Natchez, Jackson, Canton, Minniola and Greenville, Miss., as
well as from those doing business at Crowley, Opelousas, Lake Charles and Baton Rouge, Louisiana, and those doing business in Beaumont, Calvert, Greenville, Houston, Waco, Terrell, Bryan and Dallas, Texas; as also the trade which he had in Pensacola, Florida.

Petitioner further represents that, because of his inability, in consequence of his injuries hereinbefore and to be hereinafter recited, he was physically unable to secure the business to which he was entitled, and which he had reason to believe he would have secured, had he been able, personally, to call upon the trade with whom he had previously dealt, and which would have advantaged him in the legitimate profit which he would have earned, in a sum exceeding Four Thousand ($4,000.00) Dollars, as will be made evident upon the trial of the cause,—inasmuch as your petitioner received no orders from any of the localities that he did not visit; and, since his partial recovery from the injuries complained of, he has been enabled to travel over the identical territory referred to, and has renewed his business relations with the parties with whom he had theretofore dealt, and increased his business in securing new and additional customers and additional orders, as a result thereof.

Petitioner further represents that, at the time of the accident resulting in the injuries hereinbefore and hereinafter complained of, your petitioner had on hand a stock of merchandise of a value in excess of Ten Thousand ($10,000.00) Dollars, and which was purchased for manufacture upon orders secured upon the quality of the goods exhibited and the samples of style of the articles to be manufactured; that the class of merchandise referred to was of that season's style and for that season's sale; that, in consequence of the injuries complained of—petitioner being unable to secure orders,—the said merchandise was left in an unmanufactured state, and in a manufactured state, which he could not sell, and resulted in a deterioration and loss to your petitioner of Three Thousand ($3,000.00) Dollars;—the said merchandise, after the season had
passed for which it was purchased and manufactured, being
12 of a value of at least Thirty-three (33%) per cent. less than
its original cost.

Petitioner further represents that orders that were obtained by him prior to the injuries sustained in consequence of the accident aforesaid, were manufactured, but not under his direct supervision; that manufacture, therefore, being without his personal attention, in consequence of the injuries sustained and his disabilitity to supervise their manufacture; that, as a result thereof, the cost of the

manufacturing was greater than would have resulted, had petitioner been able to give the conduct of his business his personal attention; and, in consequence thereof, he has sustained additional loss in a sum exceeding One thousand ($1,000.00) Dollars.

Now, petitioner further represents that the injuries sustained by him, as aforesaid, in consequence of the acts of the defendant and its employés, are of a permanent character; that, prior to the event herein complained of, your petitioner was in the enjoyment of good health, vigorous and active; that he is forty-eight (48) years of age, and has dependent upon his a wife, and, for maintenance, support and education, four (4) children, of the ages, respectively of eighteen (18) years, eleven (11) years, nine (9) years and four (4) years; that, seated in the car assigned to him by defendant's agents for safe transportation from Selma to Meridian, in consequence of the collision, your petitioner's ankles were severely sprained, and the ligaments of his legs lacerated and torn, so as to prevent the use of his limbs in locomotion, and compelling his carriage from place to place, until there had been a partial restoration, enabling petitioner to move upon crutches; that the shock to his system impaired his general health, and, during the period of time in which petitioner was under treatment, he suffered great pain and anguish, resulting from the injuries inflicted; that he was confined to his room for a period of Two (2) months, receiving constant professional medical attention and treatment, under a surgeon's direction; that he was unable, during the period aforesaid, to move from his couch and was, at all times when not confined to his bed, forced to sit in an upright position; that he could not move from place to place except by great effort and exertion, and that during
13 the period aforesaid, he was deprived of giving his personal attention to the business conducted by him, as hereinbefore recited.

Petitioner represents that, although ten months have elapsed since the accident and injuries complained of occurred, petitioner is still suffering from the effects thereof, and is unable to pursue the course to which he was accustomed, of long walks, and, in changeable weather, he sustains great pain in his lower limbs, and ankles and has not the full and free use of his limbs, as he had prior to the injuries of which complaint is here made.

Petitioner further represents that the pain and suffering which he underwent during the period aforesaid, and the permanent injuries that he believes will result from the injuries sustained, would not be, in consideration of his advanced age and prior activity, compensable in the sum of Five Thousand (5,000.00) Dollars.

Petitioner further represents that, during the period of his illness, in consequence of the injuries aforesaid, he had, in attendance upon his, a surgeon of reputation and ability in this community, whom he employs at an annual compensation for attention to himself and his family, and that he paid him, in addition thereto, the sum of Ninety-eight ($98.00) Dollars for extra services in his treatment, consequent upon the injuries received, and that he was called upon to employ, during the said period of treatment a trained nurse and

a masseuse, whom he compensated, and with other disbursements of minor detail, for bandages, ointments, salves, etc., your petitioner expended a sum exceeding, in amount, Two Hundred Fifty ($250.00) dollars,—a detailed memorandum of which will be produced upon the trial of this cause.

Petitioner further represents that the Southern Railway Company has admitted its liability in consequence of its negligent acts in the conduct and operation of its trains, in the respect herein complained of, and that it has only denied to your petitioner the payment of a fair measure of damages for the injuries thus negligently and wantonly inflicted.

14 Petitioner charges that the said Southern Railway Company has loosely and recklessly conducted and operated its road in the locality herein complained of, without a proper regard to the observance of those reasonable precautions which would insure safety to the travelling public.

Wherefore, the premises considered, your petitioner prays that the Southern Railway Company, defendant herein, be cited to appear in answer hereto, and that, it having failed to comply with the provisions of Section One of Act No. 54 of the Session of 1904, the service of process in this suit be made upon Hon. John T. Michel, Secretary of State, said service, so made, to be a service upon the said Southern Railway Company, as provided for in the act aforesaid, and that, after the legal delays and due proceedings had, there be judgment in favor of your petitioner and against the said Southern Railway Company in the full sum of Thirteen Thousand Three Hundred Forty-eight ($13,348.00) Dollars, with legal interest thereon from judicial demand until paid.

Petitioner prays for trial by jury, and for costs and for general relief.

(Signed) HENRY L. LAZARUS,
Att'y for Pet'r.

(Signed) H. MICHEL,
" HENRY RENSHAW,
Of Counsel.

A true copy.
[SEAL.] (Signed) L. W. GUNTHER,
Deputy Clerk.

15 *Citation Issued to Defendant Through Secretary of State, December 2nd, 1904.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

No. 74869.

EPHRAIM SIMON
vs.
SOUTHERN RAILWAY CO.

To the Southern Railway Company, through Hon. John T. Michel, Secretary of State of State of Louisiana, New Orleans:

You are hereby summoned to comply with the demand contained in the petition of which copy accompanies this citation, or deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans, within ten days after the service thereof.

Witness the Honorables T. C. W. Ellis, Fred D. King, Geo. H. Theard, John St. Paul, W. B. Sommerville, Judges of the said Court, this 2nd day of December in the year of our Lord 1904.

(Signed) L. W. GUNTHER,
Deputy Clerk.

Court-House Opposite Jackson Square.

[SEAL.]

Sheriff's Return on Foregoing Citation. Filed December 6th, 1904.

Received a certified copy of the within citation & petition on the 3rd day of December 1904 and on the 3rd day of December 1904 I served said copies on the within named Southern Railway Co. in the Parish of East Baton Rouge, State of Louisiana, by personal service on E. J. McGivny Ass't Sec'y of State, Jno. T. Michel, Sec'y of State being absent at the time of service.

(Signed) W. J. MILLIGAN, *Deputy.*

A true copy.

[SEAL.] (Signed) L. W. GUNTHER,
Deputy Clerk.

16 *Default Entered.*

Extract From the Minutes of Division "D."

TUESDAY, *January* 10*th*, 1905.

Present: The Honorable W. B. Sommerville, Judge.

On motion of H. L. Lazarus, attorney for Plaintiff and on showing to the Court that defendant has failed to answer though duly cited.

It is ordered by the Court that judgment by default be herein entered against said defendant.

Verdict of Jury Endorsed on Reverse of Petition.

We the jury find in favor of the plaintiff in the sum of Thirteen thousand Three hundred and forty-eight and 00/100 Dollars ($13,348.00) with interest & costs.

(Signed) SAMUEL MOHURTER, *Foreman.*

A true copy.

(Signed) L. W. GUNTHER,

[SEAL.] *Deputy Clerk.*

17 *Judgment for Plaintiff. Rendered January* 16*th*, 1905.

Civil District Court, Division "D."

No. 74869.

EPHRAIM SIMON

vs.

SOUTHERN RAILWAY Co.

Judgment.

This matter came on this day for trial by Jury on confirmation of Default entered against the Defendant on January 10th, 1905.

Present: H. L. Lazarus, H. Renshaw and H. Michael, Attorneys for Plaintiff.

Defendant absent and not represented.

And the following jury.

1. Samuel Mohurter
2. Fernando Escobedo
3. Robert L. Meyers
4. Sidney D. Perret
5. H. S. Patterson
6. Robert J. Downing
7. Wm. C. Neville
8. Chas. F. Davison
9. Geo. C. Frederichs
10. Wm. A. Mazarat
11. John A. Parody
12. Leonard Schayot.

When after hearing the pleadings, counsel and the testimony of the following named witnesses all duly sworn by the clerk on behalf of Plaintiff to-wit—Ephraim Simon Dr. C. A. Gaudet, Geo. A. Wagatha, Gus Lehman, Gus Lehman Jr., Miss Eva Simon and Ephriam Simon recalled, the charge of the Court to the Jury, the case having been submitted the jury retired to deliberate.

The Court appointed Mr. Samuel Mohurter as Foreman of the Jury.

Thereafter the Jury returned into Court and through their foreman tendered the following as their Verdict.

"We the Jury find in favor of the Plaintiff in the sum of Thirteen thousand three hundred and forty eight 00/100 Dollars
18 $13,348.00 with interest and costs.

(Signed) SAMUEL MOHURTER, *Foreman.*

On motion of Counsel for Plaintiff said Verdict was ordered recorded and judgment entered in accordance therewith.

Considering the Verdict of the Jury in this matter, and that the demand of plaintiff was proved, and the law and the evidence being in favor of said Plaintiff.

It is ordered, adjudged and decreed that the Default herein entered on January 10th, 1905, be now confirmed and made final and accordingly that there be judgment in favor of the plaintiff Ephraim Simon and against the defendant Southern Railway Co., in the full sum of Thirteen thousand three hundred and forty eight ($13,348.00) Dollars, with legal interest thereon from date of judgment until paid and for costs.

Judgment rendered in open Court January 16th, 1905.

Judgment read and signed in open Court January 20, 1905.

(Signed) W. B. SOMMERVILLE, *Judge.*

A true copy.

[SEAL.] (Signed) L. W. GUNTHER,
Deputy Clerk.

Judgment Signed.

Extract from the Minutes of Division "D."

FRIDAY, *January* 20, 1905.

Present: The Honorable W. B. Sommerville, Judge.

The judgment in this case was read and signed in open Court this day.

A true copy.

[SEAL.] (Signed) L. W. GUNTHER,
Deputy Clerk.

19 EXHIBIT "B." Filed February 6, 1905, with Bill.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

EPHRAIM SIMON
vs.
SOUTHERN RAILWAY COMPANY.

John T. Michel, Secretary of State.

STATE OF LOUISIANA,
DEPARTMENT OF STATE,
BATON ROUGE, *January 28th*, 1905.

Mr. Harry H. Hall, P. O. Box 444, New Orleans, La.

DEAR SIR: Replying to yours of the 27th inst., I beg to say that acting under the instructions of the Attorney General we simply filed the copy of citation and petition made on us in the case of "Ephraim Simon *versus* The Southern Railroad Company, No. 74869 Civil District Court, Parish of Orleans," The said Company having failed to designate an agent upon whom service of process can be made as required by law.

Yours truly,
(Signed) EUGENE J. McGIVNEY,
Ass't Secretary of State.

Dic. MLS.

20 *Restraining Order Issued to Ephraim Simon, & Marshal's Return.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana, New Orleans Division.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

The President of the United States to Ephraim Simon, Greeting:

Whereas, it has been represented unto us in our said Circuit Court on the part of The Southern Railway Company in a Bill in Equity lately exhibited against you touching certain matters and things therein set forth; and, Whereas, the Honorable Charles Parlange one of the Judges of our said Court, upon due consideration thereof, has made and allowed an order in said cause, whereby you are re-

quired to show cause on the 11th day of February 1905, at 11 A. M., why an injunction should not issue as prayed for in said Bill of Complaint; And, Whereas, the said Judge has granted and allowed an order restraining you immediately and forthwith and during the pendency of said motion for an injunction to the full extent and effect as prayed for in said Bill of Complaint.

Now, therefore, in consideration of the premises and of the allegations in said Bill contained, you, the said Ephraim Simon your agents, attorneys and servants, and each of you are hereby commanded and strictly enjoined under the penalty of the law, that you and each of you absolutely refrain and desist from further proceeding against complainant under the suit and judgment in said suit entitled Ephraim Simon *vs.* the Southern Railway Company No. 74869 Civil District Court for the Parish of Orleans or from issuing execution thereon, or attempting thereunder to seize any property movable or immovable of Complainant or in any manner attempting to enforce the same. And that you the said Ephraim Simon your agents, attorneys and servants, and each of you, remain so inhibited and restrained until the further order of our said Court in the premises.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of February in the year of our Lord one thousand nine hundred and five.

[SEAL.] (Signed) H. J. CARTER, *Clerk.*

21 [Endorsed:] U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division No. 13300 The Southern Railway Company *vs.* Ephraim Simon Restraining Order.

Marshal's Return. Filed Feb. 6, 1905.

Received by U. S. Marshal New Orleans La. Feb'y 6/05 and on same day month and year I served copy hereof on Ephraim Simon by leaving same at his domicile in New Orleans La. in the hands of his wife Mrs. Jeannette Simon, a person apparently above the age of 14 years, at and residing at the domicile of said Ephraim Simon he being absent from home at the time of said service, all of which facts I learned by interrogating said Mrs. Jeannette Simon.

(Signed) VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH, *D'y.*

22 *Subpœna in Chancery Issued to Ephraim Simon, & Marshal's Return.*

UNITED STATES OF AMERICA:

The President of the United States to the Marshal of the Eastern District of Louisiana, Greeting:

You are Hereby Commanded to summon Ephraim Simon to appear before the Honorable Judges of the Fifth Judicial Circuit of the

United States of America, at a Circuit Court to be holden on the first Monday of March 1905 then and there to answer a Bill in Chancery, filed against him wherein The Southern Railway Company — Complaintiff and said Ephraim Simon is Defendant.

Herein Fail not, and have you then and there this writ, with your endorsement thereon, how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 6th day of February in the year of our Lord one thousand nine hundred and five and 129th year of American Independence.

[SEAL.] (Signed) H. J. CARTER, *Clerk*,
By —— ——,
Deputy Clerk.

The defendant is hereby notified that he is required to enter his appearance in the Clerk's Office of the United States Circuit Court, on or before the first Monday of March 1905, otherwise the bill may be taken *pro confesso.*

(Signed) H. J. CARTER, *Clerk*,
By —— ——,
Deputy Clerk.

23 [Endorsed:] United States Circuit Court, New Orleans Division. No. 13300. The Southern Railway Co. *vs.* Ephraim Simon. Subpœna in Chancery.

Marshal's Return. Filed Feb'y 6th, 1905.

Received by U. S. Marshal New Orleans La. Feb'y 6/05 and on the same day month and year I served copy hereof on Ephraim Simon by leaving same at the dwelling-house or usual place of abode of said Ephraim Simon in New Orleans La., in the hands of his wife Mrs. Jeannette Simon an adult person who is a member and resident in the family of said Ephraim Simon, he being absent from New Orleans at the time of said service.

(Signed) VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH, *D'y.*

24 *Marshal's Return on Copy of Order on Bill of Complaint. Filed February 6th,* 1905.

THE SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

Received by U. S. Marshal, New Orleans, La., Feb. 6, '05 and on same day I served copy hereof on Ephraim Simon by leaving same at his domicile in New Orleans, La., in the hands of his wife Mrs. Jeannette Simon a person apparently above the age of 14 years, at and residing at the domicile of said Ephraim Simon he being

absent from home at the time of said service; all of which facts I learned by interrogating the said Mrs. Jeannette Simon.

(Signed) VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH, *D'y.*

25 *Order Continuing Rule for Injunction.*

Extract from the Minutes.

November Term, 1904.

NEW ORLEANS, SATURDAY, *February* 11, 1905.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

By agreement of the counsel for the respective parties it is ordered that the rule for injunction be continued to Saturday February 18, 1905, at 11 A. M.

Order Continuing Rule for Injunction.

Extract from the Minutes.

November Term, 1904.

NEW ORLEANS, SATURDAY, *February* 18, 1905.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

By agreement of counsel for the respective parties it is ordered that the rule for an injunction herein, be continued to Saturday February 25, 1905, at 11 A. M.

26 *Demurrer. Filed Feb'y 25th,* 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Demurrer of Epraim Simon, the Defendant, to the Bill of Complaint of the Southern Railway Company, the Above Named Plaintiff.

This defendant by protestation, not confessing all or any of the matters and things in the plaintiff's bill of Complaint contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer, sayeth:

1st. That the said bill doth not contain any matter of equity whereon this Court can ground any decree, or give to the plaintiff any relief against this defendant.

2nd. That this Court is without jurisdiction to hear and determine this cause, inasmuch as the complainant seeks through the process of this Court to review a judgment of the State Court and to control by its process the proceedings of said State Court with reference to a final judgment rendered therein.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly demands the judgment of this Court whether he should be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

(Signed) HENRY L. LAZARUS,
For E. Simon.

Ephraim Simon, being duly sworn, deposes and says; That the above demurrer incorporating a plea to the jurisdiction, is not interposed for delay.

(Signed) EPHRAIM SIMON.

Sworn to and subscribed before me this 25th day of February A. D., 1905.

[SEAL.] (Signed) H. MICHEL,
Not. Pub.

27 I, Henry L. Lazarus, Solicitor for Defendant, certify that in my opinion the foregoing demurrer is well grounded in point of law.

(Signed) HENRY L. LAZARUS.

28 DEPOSITIONS FOR DEFENDANT.

Deposition of Hon. Walter B. Sommerville. Filed February 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13309. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Walter B. Sommerville, being sworn, says:

I am one of the judges of the Civil District Court for the Parish of Orleans, and preside in Division "D" of that Court.

The case of Ephraim Simon *vs.* Southern Railway Company, No. 74869 of the Civil District Court for the Parish of Orleans, was filed December 1, 1904; service of citation and copy of petition were served on the Secretary of State of Louisiana on December 3, 1904; a default was taken & entered January 10th, 1905; on January the 16th 1905, the default was confirmed & the case was tried by the jury before me, in the absence of defendant from the Court. There was no haste or precipitancy in the trial. The jury was empaneled in the forenoon, and after the other business of my Division was gone through with, the case was taken up. Witnesses for the plaintiff were sworn and heard. I charged the jury, who then retired, and after consultation among themselves, rendered a verdict in the plaintiff's favor. I directed that judgment should be entered based upon the Verdict. This was on Monday January 16th, 1905.

Before signature of the judgment became due, Mr. Harry H. Hall was aware of the judgment and spoke to me on the subject. No application was made to me for a new trial, and the judgment was signed January 20th, 1905.

No application was made to me by the defendant in the case referred to for any relief from the judgment therein.

(Signed) W. B. SOMMERVILLE.

Sworn to and subscribed before me, this 9th day of February 1905.

[SEAL.] (Signed) W. HY. ALLEN,
D'y Clerk.

29 *Deposition of Ephraim Simon. Filed February 25th, 1905.*

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Ephraim Simon, being duly sworn, deposes and says:

That he is the defendant in the above numbered and entitled cause; that he was the plaintiff in the case of Ephraim Simon *versus* Southern Railway Company, instituted in the Civil District Court for the Parish of Orleans, numbered 74869 of the Docket of said Court, and which cause was heard before the Honorable W. B. Sommerville and a jury duly empaneled and sworn, and the execution of which judgment is sought to be enjoined in these proceedings;

Deponent further says that on the trial of said cause, after having been duly sworn in the presence of the judge and the jury he testified in support of his demand and submitted himself to cross examination by both the Court and the jury, and that all statements made by him of his own knowledge were true in point of fact, and that those statements which the Court permitted to be made upon information and belief, he believed to be true; that the charge contained in complainant's bill that this deponent "falsely and fraudulently pretended that he had been injured in that sum by reason of the collision," is a wilful, wanton and malicious attack upon his evidence and is untrue; that aside from and independent of deponent's testimony delivered as evidence in that cause, the case was, as deponent believes, established by the disinterested testimony of Gustave Lehmann, Sr., Gustave Lehmann, Jr., and Dr. C. A. Gaudet and others, and that the*y* jury composed, as your deponent is advised, informed and believes, of reputable citizens, and those deliberations were presided over by Honorable W. B. Sommerville,
30 one of the judges of the Civil District Court for this Parish, found in favor of this deponent, and the court decreed in its judgment that the claim of this deponent had been proved.

Deponent further says that the statement embodied in complainant's bill that this deponent presented to the complainant "an exaggerated and untrue statement of his injuries, falsely claiming that he had been damaged * * * in the sum of five thousand dollars, of which amount he demanded payment of your orator in full and complete satisfaction of all claims against it," is wilfully, wickedly and maliciously false and untrue; that at no time from the date of the injury inflicted upon deponent, has he ever presented or demanded of said Southern Railway Company any sum of money or made any demand whatever except as recited in his petition which he filed in court and upon which the verdict of the jury and the judgment of the court were rendered.

Deponent further says that the statement in the bill that there was any tender of any amount or any discussion with reference to any settlement in any sum by the representatives of the plaintiff corporation, the Southern Railway Company, and your deponent, is absolutely and unqualifiedly false, and that at no time was he personally offered, as stated in said bill of complaint, "three hundred and fifty dollars in full compensation of his said injuries" and the statement; "that the said Simon refused to accept said three hundred and fifty dollars but considered and discussed the acceptance of seven hundred and fifty dollars, which was not agreed to by plaintiff's representative," are statements that are untrue, false and malicious; that he was approached on two separate occasions by people representing themselves to be representatives of the Southern Railway Company; that on the first occasion he declined to entertain any proposition looking to an adjustment in the absence of
31 Henry L. Lazarus, his counsel, and that he referred the parties approaching him to his said attorney, to submit their proposition to his said counsel, and if an adjustment could be effected, to be made by and through him; that contemporaneously with the visit of the said representatives of the Southern Railway Company to your deponent, he advised by letter Henry L. Lazarus, his counsel in charge of his interests, that they had called on him and that he had referred them to said Henry L. Lazarus that at that interview there were present his daughter, Eva Simon, and his wife Jeanette E. Simon; that on that occasion there was nothing whatever said by the representatives of the Southern Railway Company nor by this deponent with reference to the quantum or measure of damages resulting from the injuries inflicted upon this deponent by the acts of the Southern Railway Company; that there was a second call on or about the 4 day of April 1904 of the representatives of the Southern Railway Company, or those who represented themselves to be its representatives, with a view to arranging if possible the damages sustained in consequence of the Southern Railway Company's acts; that again this deponent refused to discuss with them the measure of damages inflicted and the amount to which he was entitled therefor, and referred them to his counsel, Henry L. Lazarus, and contemporaneously therewith advised by letter said Henry L. Lazarus of the call by said company's representatives, and of deponent's direction to them to see said Henry L. Lazarus with reference to adjusting the damages resulting from the injuries by this deponent sustained; that there was nothing said either by those representing the Southern Railway Company or by this deponent with reference to the amount of damages sustained in consequence of the injuries suffered, and at no time was it the subject of discussion or consideration between this deponent and the representatives of said Southern Railway Company; that even at the time of the interview last referred to, this deponent was not able to state with anything like definiteness, even to his attorney, what injuries he had sustained, and it was not until some time later that
32 he put said Henry L. Lazarus, his counsel, in possession of the information upon which his suit was brought and prosecuted.

That the statement is made in the bill that this deponent "instead of terminating said discussion and attempted adjustment by a refusal, but leaving your orator in the belief that he was still considering and would submit a modified offer of settlement, surreptitiously and without the knowledge of your orator, entered against it in the Civil District Court for the Parish of Orleans, numbered 74869 of its Docket, a suit for damages sustained by him in the collision aforesaid, and instead of suing for the seven hundred and fifty dollars, the amount of suggested compromise, or the five thousand dollars, the amount of his claim as made out and presented originally he claimed in said suit to have sustained damages in the full sum of Thirteen thousand three hundred and forty-eight dollars falsely and fraudulently pretending that he had been injured in that sum by reason of the collision aforesaid:" that so much of said statement in said bill as charges that this deponent left the representatives of the Southern Railway Company or the Southern Railway Company under the belief that negotiations looking to an adjustment were pending and that they would probably result in an agreement of settlement, is absolutely and unqualifiedly false, and made wantonly and maliciously; that he at no time, and nowhere, and with no person, ever undertook to adjust or settle the amount of damages for the injuries inflicted, or led them to believe by any statement, representation or action upon deponent's part, that he would not assert his rights to recover the full measure of damages inflicted in consequence of complainant's conduct; and it is false and untrue to say in said complaint that this deponent "falsely and fraudulently claimed Thirteen thousand three hundred and forty-eight dollars instead of seven hundred and fifty or Five thousand dollars" when the fact and the truth is that the damages sustained by deponent equals the amount for which this deponent sought recovery, and which right of recovery and the amount thereof
33 was recognized both by the jury and the trial judge who presided over their deliberations.

Deponent further says that it is false, wanton and malicious to charge him with having caused to be empaneled a jury and to have fraudulently confirmed a default by the jury thus empaneled, and which verdict was subsequently embodied in the judgment of the Civil District Court; that he had nothing whatever to do with the allotment of the case in the Civil District Court; that he had nothing to do with the selection of the panel of jurors to try the cause; that he has no recollection of knowing any of the jurors personally who sat in judgment on his cause; that he is informed, advised and believes, and so avers the fact to be, that the jury empaneled to try his cause was the regular panel of jurors for the Civil District Court, and that it was ordered transferred from Division "A" by the Honorable T. C. W. Ellis, presiding, to Division "D" in which said cause was tried before the Honorable W. B. Sommerville, and from which panel the jurors after each juror was examined on his *voire dire*, were selected, and all of whom, as this deponent now remembers, testified they knew neither the plaintiff nor the defendant in the cause, and that they would try the case upon the evidence that

was administered in the cause and before the court, and give a verdict in accordance with the directions of the judge and in accordance with the law.

The statement that your deponent was guilty of "subterfuge and fraud" in claiming and adducing testimony to the effect that he had sustained damages in the sum claimed, is, so far as the charge of fraud is made, a wanton, false and malicious assault without justification in fact; as a matter of fact all the witnesses testifying in the cause in the presence of the court and the jury, and in the hearing of your deponent, testified to facts which were true to this deponent's knowledge, and upon which deponent was entitled to the award accorded him by the jury and proved to the satisfaction of the Court.

Your deponent further says that he was not advised, nor has he any personal knowledge of the fact, whether the service
34 made upon the Secret.ry of State, the complainant's legal agent, was notified to it or not; he does not know the Secretary of State not his assistant, nor has he ever at any time, communicated with him in reference to this cause other than through the processes of this Court, issued at his counsel's instance and for this deponent's benefit.

Your deponent further says that there was no undue haste, as appears from the Record, in the prosecution of this cause in the Civil District Court; that a long period of time was allowed to elapsed before a default was taken, and additional delays accorded before its confirmation; that your deponent is advised, informed and believes, and so avers the fact to be, that the complainant, the Southern Railway Company, had notice in time to have prevented the signing of the judgment, and that there was no motion made for a new trial, nor was there any relief applied for to the State Court from the judgment herein complained of.

Further, deponent sayeth not.

(Signed) EPHRAIM SIMON.

Sworn to and subscribed before me this 25th day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

35 *Deposition of Henry L. Lazarus. Filed February 25th,* 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Henry L. Lazarus, being duly sworn, deposes and says:

That he is by profession a lawyer and a solicitor in equity proceedings in this Court; that he has been in the active practice of

his profession for a period of upwards of thirty years; that as an attorney, he was retained and employed by Ephraim Simon to institute and prosecute on his behalf his claim for damages for injuries sustained by him in consequence as deponent was informed, of the gross and criminal neglect of the Southern Railway Company in transporting for hire the said Ephraim Simon, the said cause of action being as stated in a petition prepared by this deponent and filed in the Civil District Court for the Parish of Orleans against the Southern Railway Company; and which cause was allotted to Division "D" of said Court, presided over by the Honorable W. B. Sommerville, and in which proceeding said Simon prayed for adequate relief, and, among other things, for a trial by jury; that, after service of process, as appears by the Record, more than the legal delays elapsed before a default was taken, and more than the legal delays elapsed before its confirmation; that the cause was heard and determined by the judge in charge of the case and a jury duly empaneled and sworn, and the evidence administered upon the trial of the cause this deponent believes to have been in all respects true.

Deponent further says that as the attorney of Ephraim Simon, he endeavored to ascertain, by application to the office of the Secretary of State, whether the said Southern Railway Company had designated an agent in this State upon whom process could
36 be served, and that he was informed that no such designation had been made by said Southern Railway Company; and that this deponent — advised that under the law the service should be made upon the Secretary of State, and upon due return thereof, the proceedings aforesaid were taken.

Deponent further says that immediately upon his being retained by Ephraim Simon to assert and prosecute his cause of action, as set forth in his petition in the Civil District Court aforesaid, he called upon said Simon for the data upon which to prepare said suit but that said Simon was not in a position then to advise him of the injuries sustained and the damages suffered in consequence of the acts of the said Southern Railway Company as aforesaid that it was some time later before this deponent came into possession of a full statement of the injuries suffered by said Simon and the damages caused him in consequence thereof, and that owing to the approaching vacation of the Court, your deponent delayed bringing this action although repeatedly requested so to do by said Simon; that the delay was in consequence of the pressure of other business entrusted to this deponent, and it is not in any manner attributable to said Ephraim Simon.

Deponent further says that he was advised by letter of said Ephraim Simon which he annexes to his deposition as an exhibit, bearing date of March 3rd, 1904, that one J. C. Andrews and another person claiming to represent the Southern Railway Company, called upon him and stated that they would send the company's physician to examine him; that the said Simon advised them of the physician in attendance upon him, and referred the representatives of said company to your deponent as his attorney and that they said they would call upon this deponent all of which will more fully and at

large appear by reference to the said letter of Ephraim Simon addressed to your deponent and marked for identification "Lazarus—1." That on the same day to-wit, March 3rd, 1904, but at a later hour, the said Andrews and the doctor of said railway
37 company called upon the said Simon and examined his condition and attempted, so your deponent is informed and believes, to effect a compromise with the said Simon, but again the said Simon referred him to your deponent, this notwithstanding the said officials tried to insist upon an adjustment, all of which will more fully and at large appear by reference to the letter of Ephraim Simon addressed to your deponent, dated March 3rd, 1904, attached hereto as an exhibit and marked "Lazarus—2"; that your deponent has no independent recollection of the date on which the parties referred to in said letter called upon him, but that his memory is refreshed by the date of the letters aforesaid; that the said representatives of the Southern Railway Company did make an offer to your deponent of a nominal amount to compromise the claim of Ephraim Simon but which offer was not entertained by this deponent for an instant, and at the time this deponent so informed the representatives of said Railway Company and dismissed them with the statement that as soon as Simon was able to arrive at the measure of damages inflicted in consequence of the injuries sustained, suit would at once be instituted.

Deponent further says on April 4th, 1904, of which date he has no independent recollection except from the date of the letter, he received a letter from Ephraim Simon, advising him that the representatives of the railway company had called upon him and that he had referred the said representatives to this deponent to effect a settlement of his claim if possible, all of which will more fully and at large appear by reference to the letter aforesaid, annexed hereto as an exhibit and marked "Lazarus—3"; deponent says that he recalls the visit of two gentlemen representing themselves as the representatives of the Southern Railway Company, who informed this deponent that they had approached Simon with a view to adjusting his claim for damages and that Simon had referred them to this deponent; that deponent and said representatives had a conference lasting probably fifteen minutes, in which they made a ridiculously low offer, but in excess of the amount originally offered; as deponent now remembers, their offer to settle Simon's claim
38 for damages, was to pay him the sum of $750; this was at once declined and the statement made by this deponent that further negotiations were useless and that as soon as deponent was in possession of the data and information to frame a complaint against the Southern Railway Company, he would at once institute suit; deponent did not know at that time what measure of damages said Simon had suffered, but he did say prior to their offer of $750. and when pressed and solicited by them to submit a proposition, that if they would submit a proposition of $7500, and that would even in part indemnify Simon, deponent would advocate and urge its acceptance, but that deponent did not know at that time what measure of damages was; it was a mere suggestion by deponent which

prompted the offer by them of $750 as aforesaid, and which offer when made was at once rejected with the statement that suit would be instituted for the recovery of the full measure of damages sustained.

Deponent further says that the Southern Railway Company, complainant herein, is represented in the City of New Orleans and in the State of Louisiana by local agents; that he is informed, advised and believes, and so avers the fact to be, from testimony delivered in the Civil District Court in his hearing by L. S. Berg, that the terminals of what is known as the "Frisco System" are owned in equal parts by the "Frisco System" and the Southern Railway Company, & that deponent is informed & believes that Harry H. Hall, Esquire, and C. C. Harvey, are on the Board of Directors of said System representing the said Southern Railway Company's interests in said system, and that they were at the time of the institution of this suit, and the Southern Railway Company is now, doing business in the City of New Orleans and the State of Louisiana.

Deponent further says that Harry H. Hall, Esquire, a solicitor of this Court, and appearing herein as Solicitor for the complainant informed this deponent that on Tuesday, the 17th day of January 1905, after having examined the Record in the suit of Ephraim Simon *versus* Southern Railway Company, he communicated the facts disclosed by the Record to the Solicitor or Assistant
39 Solicitor of the Southern Railway, residing in Washington, District of Columbia; that in said communication he advised them of the rendition of the verdict and judgment aforesaid.

Deponent further says that the usual time for the transmission of a letter from New Orleans to Washington, is less than forty hours, and that in the usual course of business a letter mailed on Tuesday, January 17th, 1905, should have reached, and should have been delivered to, the party to whom it was addressed not later than 12 o'clock on Thursday, January 19th, 1905; that there was abundant time between the mailing of the letter and its receipt, as well as after its receipt, to have taken such proceedings in the State Court as to have suspended the signature to the judgment in said cause by a motion for a new trial, or even by application to the judge for time in which to present a motion for a new trial; that no action whatever was taken so far as this deponent is advised or as the Record discloses, and that said judgment was not signed until Friday January 20th, 1905, at the opening of Court on that day.

That no proceedings were taken by the said Southern Railway Company in the State Court which rendered the judgment herein complained of, so far as the records of this Court disclose and so far as your deponent is advised.

Further deponent sayeth not.

(Signed) HENRY L. LAZARUS.

Sworn to and subscribed before me, this 25th day of February, A. D. 1905.

(Signed) H. MICHEL,

[SEAL.] *Not. Pub.*

40 *Letter Attached to Deposition of H. L. Lazarus, Marked Lazarus* 1.

Ladies' Underwear, Shirt Waists, and Skirts.

416 Chartres Street.

NEW ORLEANS, LA., *Mar.* 3*rd*, 1904.

"Lazarus 1."

Mr. H. L. Lazarus, City.

DEAR SIR: Mr. J. C. Andrews, of # 704 Common St., and another gentlemen of the Southern Railroad Co., were here to-day. They stated that they would send the Company's physician here to examine me. I gave them the name of my physician, and also referred them to you, as my attorney, and Mr. Andrews, stated that he would call upon you.

I am in the same condition, as I was when you saw me last. Not yet being able to stand on my feet.

Yours respectfully,
(Signed)
"

E. SIMON,
Per E. E. S.

Letter Attached to Deposition of H. L. Lazarus, Marked Lazarus 2.

Ladies' Underwear, Shirt Waists, and Skirts.

416 Chartres Street.

NEW ORLEANS, LA., *Mar.* 3*rd*, 1904.

Lazarus 2.

Mr. H. L. Lazarus, City.

41 DEAR SIR: Mr. Andrews, a Railroad official, and the Railroads' doctor were here just now, (5 o'clock) the doctor examined my feet, and the official tried to make a compromise with me, but I referred them to you. The official tried to insist, but I would do nothing, but refer him to you. They stated that they would call you, and then see me.

Respectfully yours,
(Signed)
"

E. SIMON,
Per E. E. S.

Letter Attached to Deposition of H. L. Lazarus, Marked Lazarus 3.

Ladies' Underwear, Shirt Waists, and Skirts.

416 Chartres Street.

NEW ORLEANS, LA., *Ap'l* 4, 1904.

Lazarus 3.

Mr. H. L. Lazarus, City.

DEAR SIR: I have referred, the gentlemen who were here this evening, from the Railroad Co. to you, to effect a settlement, if possible.

I am getting along nicely, but very slowly, and can walk with my crutches, about a half a block, at most.

I write this to inform you of my present condition.

Yours respectfully,
(Signed)
E. SIMON,
Per E. E. S.

42 *Deposition of Gustave Lehmann, Sr. Filed February* 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Gustave Lehmann Sr. being duly sworn, deposes and says;

That he is a member of the commercial firm of A. Lehmann & Company, importers and wholesale dealers in dry goods in the City of New Orleans, and that he is a director in the Whitney National Bank of New Orleans, and a resident of the City of New Orleans for the past thirty years.

That he is personally acquainted with Ephraim Simon, the defendant in the cause of Southern Railway Company, vs. Ephraim Simon, No. 13300 of the docket of the United States Circuit Court for the Eastern District of Louisiana; that he has known the said Ephraim Simon for a number of years; that in his dealings and transactions with the said Ephraim Simon he has been in all things honorable and truthful and is a man of irreproachable character and worthy of the highest consideration; that said Simon *us* engaged as a manufacturer in this City, and to deponent's knowledge from his business relations with him, the said Ephraim Simon gives the business his personal attention; that he is his own buyer, and deponent

is advised informed and believes and therefore states, that the said Simon does exclusively his own traveling and soliciting for trade.

That deponent was called as a witness on the trial of the cause of Ephraim Simon *versus* Southern Railway Company, in the Civil District Court for the Parish of Orleans, which cause was tried by the Honorable W. B. Sommerville and a jury, and before them deponent testified on behalf of the said Ephraim Simon, and that the evidence delivered by deponent on the trial of the cause was in all respects true and were facts within the personal knowledge of deponent.

And further, deponent sayeth not.

(Signed) G. LEHMANN, SR.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

43 *Deposition of Gustave Lehmann, Jr. Filed February 25, 1905.*

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. —. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Gustave Lehmann Jr., being duly sworn, deposes and says:

That he is a member of the commercial firm of A. Lehmann & Company, wholesale merchants and importers, doing business in the City of New Orleans.

That he was born here and has resided here all his life;

That he is personally acquainted with and knows well Ephraim Simon, defendant in this Court in the cause of the Southern Railway Company *vs.* Ephraim Simon, No. — of the Docket of the United States Circuit Court for the Eastern District of Louisiana;

That he has come in business contact with the said Ephraim Simon, either as the purchaser of his wares or as vendor of merchandise to the said Simon; that at all times he has found him honorable in his dealings and truthful in his statements; that he enjoys in the commercial world in which he moves an honorable record, and is worthy of the highest consideration; that he would accept any statement from the said Ephraim Simon without question;

That he was present during the progress of the trial in the Civil District Court in which said Ephraim Simon was plaintiff and the Southern Railway Company defendant, the said trial having taken place before the Honorable W. B. Sommerville and a jury empaneled to try the cause; that deponent was a witness in said cause

on behalf of said Ephraim Simon, and that his statements to the Court and to the jury were in all things true, and were statements of fact within deponent's personal knowledge.

And further, deponent sayeth not.

(Signed) GUS. LEHMANN, JR.

Sworn to and subscribed before me this 23rd day of February A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

44 *Deposition of Herman Michel. Filed February* 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Herman Michel, being duly sworn, deposes and says;

That he is an attorney at law practicing in the Courts of Louisiana and in the United States Courts; that he is associated in the practice of his profession with Henry L. Lazarus, and that he was of counsel in the cause of Ephraim Simon *versus* Southern Railway Company, No. 74869, of the Docket of the Civil District Court for the Parish of Orleans;

That on the first day of December 1904, he presented to the Clerk of the Civil District Court, or one of his authorized deputies, the petition in the above numbered and entitled cause; that the said cause was entered upon the general docket of the said Civil District Court under the title of Ephraim Simon *vs.* Southern Railway Company; that it was again entered upon Docket No. 4 to which the class of cases involving a certain amount is referred for docketing, and against said suit was entered at large upon said docket; that the said dockets of the Civil District Court are public records and open at all times during court hours to the inspection of the public; that there was no concealment upon the part of this deponent or his associates of the institution of the suit aforesaid; deponent further says that in the Daily Court Record, the said suit was listed and published; that all proceedings had in the cause were had in open court; that deponent took the preliminary default in open court, and was present and assisted in the trial on the confirmation of the default before the judge and jury who heard and determined said cause.

Further, deponent sayeth not.

(Signed) H. MICHEL.

Sworn to and subscribed before me this 25th of February 1905.

[SEAL.] (Signed) WILLIAM ARDILL, *Not. Pub.*

45 *Deposition of Herman Weil. Filed February* 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Herman Weil being duly sworn, deposes and says;

That he is a member of the commercial firm of Kohn & Weil wholesale merchants in this City;

That he knows Ephraim Simon, the defendant in the above numbered and entitled cause, that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) HERMAN WEIL.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

46 *Deposition of Leon Schwartz. Filed February* 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Leon Schwartz, being duly sworn, deposes and says;

That he is a member of the Commercial Firm of Schwartz Bros. & Co., wholesale dealers in dry goods in this City; that he knows Ephraim Simon, the defendant in the above numbered and entitled cause that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him, and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) LEON SCHWARTZ.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

47 *Deposition of Adolph Katz. Filed February 25th, 1905.*

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Adolph Katz, being duly, sworn, deposes and says;

That he is a member of the Commercial firm of S. J. Katz & Company, wholesale merchants, doing business in the City of New Orleans, that he is a Director in the New Orleans National Bank of New Orleans;

That he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) ADOLPH KATZ.

Sworn to and subscribed before me this 23rd, day of February A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

48 *Deposition of William Adler. Filed February 25, 1905.*

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

William Adler, being duly sworn, deposes and says;

That he is president of the State National Bank of New Orleans; that he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business

transactions with him, and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) WILLIAM ADLER.

Sworn to and subscribed before me this 23rd day of February A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

49 *Deposition of Charles A. Morgan. Filed February* 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Charles A. Morgan, being duly sworn, deposes and says;

That he is Vice-President of the State National Bank of New Orleans; that he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) CHARLES A. MORGAN.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

50 *Deposition of Eugene Ellis. Filed February* 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Eugene Ellis, being duly sworn, deposes and says;

That he is a member of the commercial firm of May & Ellis Importers, doing business in the City of New Orleans;

That he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with the said Ephraim Simon and that he has found him at all times honorable in his dealings and truthful in his statements.

That deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) EUGENE ELLIS.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

51 *Deposition of Charles H. Culbertson. Filed February 25, 1905.*

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Charles H. Culbertson, being duly sworn, deposes and says;

That he is Vice-President and Cashier of the State National Bank of New Orleans;

That he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with the said Ephraim Simon and that he has found him at all times honorable in his dealings and truthful in his statements;

That deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) C. H. CULBERTSON.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

52 *Deposition of G. Wagatha. Filed February 25, 1905.*

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

G. Wagatha, being duly sworn, deposes and says;

That he is an officer in the Branch Depository of the State National Bank of New Orleans;

That he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him, and that he has found him at all times honorable in his dealings and truthful in his statements;

That deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

That on the trial of the cause before the Honorable W. B. Sommerville and a jury empaneled to try the same, in the Civil District Court of the Parish of Orleans, deponent was a witness on behalf of said Ephraim Simon, and that his statements to the Court and to the jury were in all things true, and statements of fact were to deponent's personal knowledge.

Further, deponent sayeth not.

(Signed) GEO. A. WAGATHA.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

53 *Deposition of J. H. Curtin. Filed February 25, 1905.*

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

J. H. Curtin, being duly sworn, deposes and says;

That he is a citizen of Louisiana, residing in the City of New Orleans; that he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said

Ephraim Simon covers a period of several years; that he has had business transactions with the said Ephraim Simon and that he has found him at all times honorable in his dealings and truthful in his statements;

That deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) J. H. CURTIN.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

54 *Deposition of S. E. Worms. Filed February* 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

S. E. Worms, being duly sworn, deposes and says;

That he is president of the S. E. Worms Company, Ltd., conducting a wholesale business in the City of New Orleans;

That he knows Ephraim Simon the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him, and that he has found him at all times honorable in his dealings and truthful in his statements; that deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) S. E. WORMS.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

55 *Deposition of Felix Levy. Filed February* 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Felix Levy, being duly sworn, deposes and says;

That he is a member of the commercial firm of Levy, Loeb & Company, wholesale merchants of the City of New Orleans;

That he knows Ephraim Simon, the defendant in the above numbered and entitled cause; that his acquaintance with the said Ephraim Simon covers a period of several years; that he has had business transactions with him and that he has found him at all times honorable in his dealings and truthful in his statements;

That deponent regards the said Ephraim Simon as a man of irreproachable character and entitled to the highest consideration.

Further, deponent sayeth not.

(Signed) F. U. LEVY.

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

56 *Deposition of Dr. C. A. Gaudet. Filed February* 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

C. A. Gaudet, being duly sworn, deposes and says;

That he is a practicing physician and surgeon for upwards of thirty years in the City of New Orleans;

That he has known Ephraim Simon, defendant in the above numbered and entitled cause for several years, and has been and is now the attending physician of said Ephraim Simon and his family;

That he was called upon professionally by said Simon to attend him as a physician and surgeon in the month of February, 1904, for injuries sustained by said Simon, and which he was informed was the result of an accident on the railroad of the plaintiff com-

pany, of this fact, however, deponent has no personal knowledge; that the injuries sustained by the said Simon were serious, and required deponent's skill and attention for upwards of two months; that independent of the annual retainer which this deponent receives for professional attention in the treatment of ordinary cases of the family of Ephraim Simon and himself, there was an additional charge for professional surgical attention to the said Simon for the injuries hereinbefore recited;

That he has known the said Ephraim Simon for several years, and in all his dealings he has found him honorable and in all his statements truthful; and he is a man of irreproachable character;

That this deponent was called as a witness in the case of Ephraim Simon *vs.* Southern Railway Company, pending in the Civil District Court for the Parish of Orleans, which case was tried by the Honorable W. B. Sommerville, aided by a jury; that he heard
57 the witnesses testify in the case, and that he heard Ephraim Simon testify, and independent of describing the pains which he suffered, and which deponent believes to be true because of the character of the injuries sustained, all statements made by Simon with reference to said injuries and the treatment thereof were, to deponent's knowledge true and correct; that all statements made by this deponent to the Court and jury were true, and those facts recited in the evidence of this deponent, were within his personal knowledge.

Further, deponent sayeth not.

(Signed) C. A. GAUDET, *M. D.*

Sworn to and subscribed before me this 23rd day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

58 *Deposition of Eva E. Simon. Filed February* 25, 1905.

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Eva E. Simon, being duly sworn, deposes and says:

That she is the daughter of Ephraim Simon, the defendant in this cause and who was the plaintiff in the trial of the cause of Ephraim Simon *versus* Southern Railway Company, No. 74869 of the Docket of the Civil District Court for the Parish of Orleans;

That she was called as a witness in said cause on behalf of plaintiff, and after having been duly sworn in open Court and in the presence

of the jury, testified as a witness in said cause; that all facts testified to by her were within her personal knowledge and were true.

Deponent further says that as a rule she conducts her father's correspondence; that the three letters annexed to the deposition of Henry L. Lazarus, were composed by her, two of which were typewritten and one of which is in her own writing; that they were written under the directions of her father at the time stated in said letters and on the dates thereof, and were sent at once to Henry L. Lazarus, her father's attorney.

Deponent further says that she was present at both interviews of the representatives of the Southern Railway Company when they were attempting and insisting upon an adjustment of Ephraim Simon's claim for damages against said railroad resulting from the accident upon its system of railroad and of which he complained; that on both occasions said Ephraim Simon declined to enter into any discussion or negotiations looking to the adjustment of his claim for damages against the said railroad; that he referred the parties addressing him in the interest of said Southern Railway Com-
59 pany to said attorney, informing them that said attorney alone could effect the adjustment; that on neither occasion was there any sum of money mentioned, and that the statement in the bill of complaint to which deponent's attention has been directed by Henry L. Lazarus that the sum of $350, or $750 or $5000 as the basis either of settlement or demand for compensation, is untrue in point of fact.

Deponent further says that at the time of the interviews hereinbefore referred to, her father was not in a position to state what effect of his injuries were or the measure of damages that he sustained; that that was only ascertained at a date much later, when the information which was the basis of the claim of her said father, was handed to Henry L. Lazarus, his counsel.

Further, deponent sayeth not.

(Signed) EVA E. SIMON.

Sworn to and subscribed before me this 25th day of February, A. D. 1905.

[SEAL.] (Signed) H. MICHEL, *Not. Pub.*

60 *Hearing and Continuance of Rule for Injunction.*

Extract from the Minutes.

November Term, 1904.

NEW ORLEANS, SATURDAY, *February* 25, 1905.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

This cause came on to be heard this day on the Rule for an Injunction.

Present: Harry H. Hall Solicitor for the complainant.
" Henry L. Lazarus solicitor for the Defendant.

Whereupon Counsel for the respective parties offered affidavits, and on motion of solicitor for complainant, stating he desired to examine the affidavits offered on behalf of defendant and had not had an opportunity to do so, it was ordered that the hearing of the rule for injunction herein be continued for two weeks or until March 11, 1905, at 11 A. M.

61 *Order Continuing Rule for Injunction.*

Extract from the Minutes.

November Term, 1904.

NEW ORLEANS, SATURDAY, *March* 11, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

By request of H. H. Hall solicitor for the complainant Counsel for defendant consenting.

It is ordered that the Rule for Injunction be continued to March 18 1905 at 11 A. M.

62 *Motion & Order Continuing Case.*

Extract from the Minutes.

November Term, 1904.

NEW ORLEANS, *March* 18, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

On motion of H. L. Lazarus of Counsel for defendant, suggesting that H. H. Hall solicitor for complainant desires a continuance in this case,
It is ordered that this case be continued by consent to Wednesday March 22, 1905 at 11 A. M.

63 *Order Continuing Application for a Preliminary Injunction.*

Extract from the Minutes.

November Term, 1904.

NEW ORLEANS, WEDNESDAY, *March* 22, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

By agreement of Counsel for the parties.
It is ordered that the Application for a Preliminary Injunction be continued to Saturday March, 25, 1905, at 11 A. M.

64 *Order Continuing Rule for Injunction.*

Extract from the Minutes.

November Term, 1904.

NEW ORLEANS, SATURDAY, *March* 25, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

On the application of Counsel for defendant.
It is ordered that the Rule for an Injunction herein, be continued to April 1, 1905 at 11 A. M.

65 *Order Continuing Rule for Injunction.*

Extract from the Minutes.

November Term, 1904.

NEW ORLEANS, SATURDAY, *April* 1, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

By request of H. H. Hall solicitor for complainant suggesting, that counsel for defendant desires a continuance herein.
It is ordered that the Rule for an Injunction do over by consent for 1 week.

66 *Appearance. Filed April 3rd, 1905.*

U. S. Circuit Court, East. Dist. of La. In Equity.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

To the Clerk of the United States Circuit — of the Eastern Dist. of La.:

Please enter my appearance as solicitor for Defendant in the above entitled cause.

(Signed) HENRY L. LAZARUS,
Solicitor for Def.,
Per D. S.

Apr. 3rd, '05.

67 *Order Continuing Rule for Injunction.*

Extract from the Minutes.

November Term, 1904.

NEW ORLEANS, SATURDAY, *April* 8, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

By agreement of Counsel by request of solicitor for defendant, the rule herein is continued to April 15, 1905 at 11 A. M.

68 *Order Continuing Rule for Injunction.*

Extract from the Minutes.

November Term, 1904.

NEW ORLEANS, SATURDAY, *April* 15, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

By consent of counsel for the respective parties with leave of the Court, the Rule for an Injunction herein is continued to April 29, 1905, at 11 A. M.

69 *Motion and Order Continuing Rule for Injunction.*

Extract from the Minutes.

April Term, 1905.

NEW ORLEANS, SATURDAY, *April* 29, 1905.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

By agreement of counsel for the respective parties it is ordered that the motion for an injunction be continued to May 6, 1905 at 11 A. M.

70 COMPLAINANT'S EXHIBITS.

EXHIBIT B 1.

Affidavit of Dr. E. D. Martin. Filed May 6, 1905.

United States Circuit Court.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

E. D. Martin, being duly sworn, deposes and says that he is and has been a practicing physician and surgeon in the City of New Orleans for many years;

That in March 1904, he examined Ephraim Simon having called to see him for the purpose of making a professional examination of injuries said to have been the result of a Railroad Accident;

That his ankles were badly swollen due apparently to a concussion received through the soles of his feet and while it was severe and obviously painful, the tissues of his feet and ankles and legs were not lacerated, nor were the tendons thereof in any manner ruptured, the very nature of the accident necessarily precluding such effect;

That affiant at the time, had no reason to believe nor has he now any reason to believe that the injury complained of would be of a permanent nature or cripple or disable said Simon.

(Signed) E. DENEGRE MARTIN.

Sworn to and subscribed to before me this 9th day of March 1905.

[SEAL.] (Signed) CHARLES ROSEN,
Notary Public.

71 EXHIBIT C 2.

Affidavit of F. E. Shumate. Filed May 6, 1905.

U. S. Circuit Court, Eastern District of La.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

Before me, the undersigned, Notary Public in and for the Parish of Orleans, State of Louisiana, personally appeared F. E. Shumate who being duly sworn, deposes and says:

I am Law Agent of the Southern Railway Company and reside in

the City of Dalton, State of Georgia, where I have my office. My duties are investigating and adjusting claims against the Southern Railway Company, for damages arising from or growing out of injuries to persons or property.

In pursuance of my duties and acting upon instructions from the Asst. Chief Law Agent of the Southern Railway Company, I went to New Orleans during the month of March, 1904, arriving there on the morning of March 3rd, 1904, for the purpose of investigating as to the extent of certain injuries alleged to have been sustained by Mr. E. Simon, of 416 Chartres Street, in an accident to train No. 15 of the Southern Railway near York Ala., upon which train he was a passenger; and to make settlement with him for his damages on account of the said alleged injuries.

I went to see Mr. Simon on the morning of said 3rd. day of March and I found him at his residence, which is also his place of business, at 416 Chartres Street, he was in his store, seated upon a chair and apparently conducting his business. He was complaining of both feet and ankles, and after some conversation with him, I asked him if he would allow Dr. Denegre Martin to make an examination of his injuries, and he said that he would, and later in the day, I returned to see him, accompanied by Dr. Martin, and Dr. Martin made an examination of his feet and ankles. After discussing the nature and extent of his injuries with Dr. Martin, I told Mr. Simon that
72 I was there for the purpose of settling the matter with him, and started to discuss a settlement with him. He refused to discuss the matter with me, and referred me to Mr. H. L. Lazarus of 830 Common, whom he said he had employed to represent him, stating that Mr. Lazarus was his attorney and any settlement that was made would have to be made with him; that anything Mr. Lazarus did would be satisfactory to him and that he would make no settlement independent of him.

I then, in company with Mr. J. C. Andrews, called upon Mr. Lazarus at his office, and after being introduced by Mr. Andrews told him that I was the representative of the Southern Railway Company, and had been referred to him by Mr. Simon, and that I desired to discuss a settlement of Mr. Simon's claim with him. We discussed the matter at length and I finally asked Mr. Lazarus to make me a proposition of settlement but he insisted that I should make the proposition and I offered him $300.00. He replied that he would not accept if I made it as many thousands, and believing that there was no chance to settle the matter at that time, as he seemed to want more than I was willing to pay, I asked him to think the matter over and make the Company a proposition that would be fair and reasonable both to the Southern Railway Company and Mr. Simon and to submit such a proposition to me, and I would take it up with the proper officials of the Railway Company, and give him an answer promptly. I made him no further proposition, and left him expecting a proposition to come from him, but no proposition of settlement was ever made to me. I reported my actions in the matter to Mr. Walter Kennedy, Asst. Chief Law Agent of the Southern Railway Company, who has handled the matter since.

(Signed) F. E. SHUMATE.

Sworn to and subscribed to before me, this 17th day of March 1905.

[SEAL.] (Signed) PURNELL M. MILNER, *Not. Pub.*

73 EXHIBIT D 3.

Affidavit of Walter Kennedy. Filed May 6, 1905.

UNITED STATES OF AMERICA,
District of Columbia, City of Washington, ss:

United States Circuit Court for the Fifth Circuit, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Affidavit of Walter Kennedy.

Personally appeared before the undersigned Notary Public in and for the District of Columbia, the affiant, Walter Kennedy, who having been duly sworn to speak the truth, the whole truth, and nothing but the truth, deposed, as follows:

I am Assistant Chief Law Agent of Southern Railway Company I reside and have my office in the City of Birmingham and State of Alabama. My duties are the supervising, investigating and adjusting of claims against Southern Railway Company for damages arising or growing out of injuries to persons or property.

In pursuance of my duties I made investigation of an accident resulting in the injury to One Ephraim Simon of 416 Chartres Street, New Orleans, La., who claimed to have had both ankles sprained while a passenger on train No. 15 of Southern Railway Company on the 8th day of February 1904, near York, Ala. This train collided with a freight train of Alabama Great Southern Railroad Company on that date.

On the 4th day of April, 1904 in company with Dr. E. D. Martin of No. 513 Canal Street, New Orleans, La. I called at 416 Chartres St. New Orleans La. which place is the residence and place of business of said Ephraim Simon. Dr. Martin, at my instance, made a personal examination of the said Simon's feet and ankles, and after the conclusion of same I approached said Simon for a settlement
74 of his claim for injuries. The said Simon declined to enter into any negotiation looking to a settlement of his claim, and referred me to one Henry L. Lazarus, whom he stated was his attorney, and who would conduct such negotiations looking to a settlement. Upon this reference I called on the said Henry L. Lazarus at his office in the said City of New Orleans, La. I introduced myself

to the said Henry L. Lazarus and stated to him my official connection with the said Southern Railway Company, and purpose of my visit, which was to settle the claim of the said Ephraim Simon against Southern Railway Company for personal injuries alleged to have been sustained as passenger on train of the said Southern Railway Company near York, Ala., February 8, 1904. The said Henry L. Lazarus after discussing the matter of Simon's claim for injuries as his counsel made a proposition to me for a settlement of the claim of Simon for the sum of $5,000.00. This proposition I rejected, stating to him that the Railway Company would not be willing to consider the settlement of this claim for such an amount. I discussed further with Mr. Lazarus the claim of Simon and argued to him that the sum of $5,000.00 was an excessive amount to pay for such a claim and endeavored to persuade him to modify his views and to reduce the figure. He, however remained firm in his demand, and declined to accept anything else than the sum of $5,000.00. In my discussion of the matter with him I agreed to pay to him on behalf of his client the sum of $750.00 but this offer was declined, and when I saw that a further discussion of the matter at that time would be of no avail. I left it in that condition with the hope that a conservative demand would be made by the said Lazarus. Mr. Lararus during the whole discussion of the matter represented himself as Counsel for Simon and fully authorized to act for him and to make any settlement of the matter which he deemed best for his client. In my negotiations with Simon himself he referred me on all matters to Mr. Lazarus, as his Counsel, and stated that Mr. Lazarus, had full authority to conduct the negotiations for him.

75 And further affiant saith naught.

(Signed) WALTER KENNEDY.

Sworn to and subscribed before me this 3rd day of March, 1905.

[SEAL.] (Signed) PEARCE HOME,
Notary Public in and for the District of Columbia.

[L. S.]

76 EXHIBIT E 4.

Affidavit of Walter Kennedy. Filed May 6, 1905.

U. S. Circuit Court, Eastern District of La. In Equity.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

Affidavit of Walter Kennedy.

Personally appeared before me, the undersigned Notary Public, in and for the Parish of Orleans, State of Louisiana, Mr. Walter Kennedy, who being duly sworn, deposes and says:

On the 4th of April, 1904, I called at No. 416 Chartres Street, defendant's place of business which has the appearance of a tailoring establishment or a shop where women's garments are made.

I found him sitting in his shop with his feet upon a chair. He was fully clothed as for the street with the exception of his shoes and socks. Carpenters were at work, tearing up and repairing the floor of his shop and garments were being made upon a table, and apparently he was engaged in the active supervision of his work.

(Signed) WALTER KENNEDY.

Sworn to and subscribed to before me this seventeenth day of March, 1905.

[SEAL.] (Signed) PURNELL M. MILNER, *Not. Pub.*

77 EXHIBIT G 5.

Affidavit of Dr. E. Denegre Martin. Filed May 6th, 1905.

U. S. Circuit Court, Eastern District of La.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

Affidavit of Dr. E. Denegre Martin.

Personally appeared before me, the undersigned Notary Public in and for the Parish of Orleans, State of Louisiana, Dr. E. Denegre Martin, who being duly sworn, deposes as follows:

In March, 1904, Mr. F. E. Shumate, Agent of the Southern Railway Company residing in Dalton, Ga., requested me to visit Mr. Ephraim Simon, defendant herein, for the purpose of examining the extent of his injuries; I did make such visit to a Mr. Simon in company with a Mr. Shumate and I found the said Simon sitting in his store with his feet upon a chair and apparently directing the management of his business.

(Signed) E. DENEGRE MARTIN.

Sworn to and subscribed to before me, this 16th day of March, 1905.

[SEAL.] (Signed) JULIAN B. HABANS, *Not. Pub.*

78 EXHIBIT F 6.

Affidavit of Dr. E. Denegree Martin. Filed May 6, 1905.

U. S. Circuit Court, Eastern District of La.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

Affidavit of Dr. E. Denegre Martin.

Personally appeared before me, the undersigned Notary Public in and for the Parish of Orleans, State of Louisiana, Dr. E. Denegre Martin, who being first duly sworn, deposes and says:

I have read the affidavit of Walter Kennedy and F. E. Shumate and in so far as the said affidavits state the presence of Ephraim Simon in his store upon the occasion, in question, of their visits and his occupation at those times, affiant corroborates the said affidavits;

Further, affiant says that he confirms and corroborates the affidavit of Walter Kennedy to the effect that Mr. Henry L. Lazarus made a proposition for the settlement of this claim of Simon for the sum of Five Thousand Dollars.

(Signed) E. DENEGRE MARTIN.

Sworn to and subscribed to before me, this 17th day of March, 1905.

[SEAL.] (Signed) BUS. ROUEN, *Not. Pub.*

79 EXHIBIT H 7.

Affidavit of J. C. Andrews. Filed May 6th, 1905.

U. S. Circuit Court, Eastern District of La.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

John C. Andrews, being sworn, says that he is by occupation a ticket agent, selling tickets in the City of New Orleans that all the tickets sold by him are furnished by the Louisville and Nashville Railroad Company, and that all of his correspondence and communications concerning the sale of tickets is with the said Louisville and Nashville Railway Company in the City of Louisville;

That many of said Louisville and Nashville Railroad tickets call for transportation over other lines of Railroad and as *as* far as the City of New York;

That many of the said tickets call for transportation over the lines of the Southern Railway Company, but none of the said lines are reached at a point nearer the City of New Orleans, than the City of Atlanta, in Georgia.

And affiant says that he has no further and other connection with the said Southern Railway Company except such as incidentally results from the sale of such tickets for transportation outside of and beyond the limits of the State of Louisiana, and that all the persons travelling on transportation thus sold by him are conveyed on trains of the Louisville and Nashville Railroad Company and no other, through and out of this State.

(Signed) J. C. ANDREWS.

Sworn to and subscribed to before me this 9th day of March, 1905.

[SEAL.] (Signed) PURNELL M. MILNER, *Not. Pub.*

80 EXHIBIT I 8.

Affidavit of H. H. Hall. Filed May 6, 1905.

U. S. Circuit Court, Eastern District of La.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

Harry H. Hall, Esq., being sworn, says that he is a member of the New Orleans Bar and has been retained as the Solicitor for the Complainant in the above entitled suit.

That, on or about the 17th day of January, 1905, affiant saw in one of the daily newspapers of this City or in the Court Bulletin a notice of the rendition of a verdict against the defendant in the case of Ephraim Simon *vs.* the Southern Railway Company, No. 74869 and that, on or about that morning, affiant examined the minutes of the Civil District Court of Division D, presided over by Judge Walter B. Sommerville, for the purpose of verifying the aforesaid publication;

That said Judge Sommerville called affiant to him and inquired if affiant represented, as its Counsel in this City, the Southern Railway Company, to which inquiry affiant replied by stating that he did not represent, as its Counsel in this City, the Southern Railway Company and that said Railway Company was not represented in this City by any Counsel or by any agent; and that said Judge

Sommerville was fully advised by affiant of the fact that said Southern Railway Company was entirely unrepresented, on or about the 17th day of January, 1905, and before the judgment in said cause and on said docket had been signed.

Further, affiant deposes and says that he was not authorized and empowered in any manner to represent said Southern Railway Company, at the time, in said proceedings or in any other legal proceedings, but that because of the reasons hereinafter set out, he, on the said 17th day of January, 1905, wrote to the Assistant General Counsel of said Southern Railway Company, Col. W. A.
81 Henderson in Washington, D. C., advising him of the fact of the rendition of the said verdict and judgment, and that thereupon, the said Col. Henderson came to the City of New Orleans, and calling at affiant's office, consulted with him relatively to the proposed filing of a bill in equity to restrain the said Simon from enforcing the aforesaid judgment, and that, after said consultation, the said Colonel Henderson, stating that it was not necessary for him to remain any longer in this City as he had business engagements elsewhere, requested affiant to prepare the bill upon the statements made to him by said Col. Henderson, and requested him to represent the said Southern Railway in this proceeding.

Affiant further deposes and says that the testimony in support of the aforesaid verdict in said Civil District Court was, as affiant is informed and verily believes not reduced to writing, by reason which intentional omission no relief could be had by appealing from this judgment to the Supreme Court of Louisiana.

Further affiant deposes and says that the Article of the Code of Practice No. 213 which formerly required the impanelling of a jury to assess the damages in suits similar to the one above referred to, was repealed by the Legislature of the State of Louisiana by Act No. 110 of 1902 and that, therefore, there was no necessity for submitting the issue to a jury rather than to the Court;

Further, affiant deposes and says that the New Orleans Terminal Company, copy of whose Charter is hereto annexed as part of said affidavit marked Exhibit X" is the sole owner of the Terminals in this City known as Port Chalmette, and other Railway Terminals in this City of New Orleans, and that the Southern Railway Company is the owner of certain shares of stock of the said New Orleans Terminal Company, its interest in which and the resulting interest in the properties owned by said New Orleans Terminal Company, said Southern Railway Company to the best of affiant's knowledge and belief, acquired by reason of the development of the City of New Orleans as an important commercial and export point and in anticipation of a possible extention at some future day of the lines of said Railway Company into this City; and affiant says that the interest of the said Southern Railway Company in the said capital
82 stock is, as stated in the affidavit of Judge Lazarus, represented by C. C. Harvey Esq., and your affiant, upon the Board of Directors of the New Orleans Terminal Company;

Further, affiant deposes and says that the operations of the said New Orleans Terminal Company are conducted by it and not by the

Southern Railway or any other Railroad Company having an interest in said stock.

And that the said "Frisco Company" referred to in the affidavit of Judge Lazarus operates its trains into this city and uses the said Terminal property, but the said Southern Railway Company neither operates its trains into this City nor does it use the said Terminal property, nor to the best of affiant's knowledge and belief, does it transact business of any kind in this City, the freight and passengers originating upon its lines of Railway being brought into this City over the Louisville & Nashville R. R. and the New Orleans and Northeastern Railroad Company both of which are independent corporations neither owned nor controlled, in any manner, by the said Southern Railway Company.

—— ——.

Sworn to and subscribed to before me, this — day of March 1905.
(Signed) HARRY H. HALL.

83 EXHIBIT J 9.

Affidavit of W. W. Finley. Filed May 6, 1905.

U. S. Circuit Court, Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
v.
EPHRAIM SIMON.

W. W. Finley, being sworn says:

I am Second Vice President of the Southern Railway Company, the complainant herein:

I have read the affidavit of Harry H. Hall, Esquire, filed herein, and, so far as the same relates to the question of Southern Railway Company transacting business in the City of New Orleans, said affidavit is true of my own knowledge. Southern Railway Company is the owner of certain shares of capital stock of New Orleans Terminal Company, but it does not own or operate any railroad in the State of Louisiana.

(Signed) W. W. FINLEY.

Sworn to and subscribed before me this 15th day of March, 1905.
(Signed) PEARCE HOME,
[SEAL.] *Notary Public, District of Columbia.*

84 "EXHIBIT X."

Charter and Amendments of the New Orleans & San Francisco Railroad Company, now the New Orleans Terminal Company.

No. 13300.

Filed May 6, 1905.
(Signed) H. J. CARTER, *Clerk.*

85 *Charter of the New Orleans & San Francisco Railroad Company.*

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
PARISH OF ORLEANS—CITY OF NEW ORLEANS.

Be it known, that on this thirty-first day of the month of December, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States of America the one hundred and twenty-seventh,

Before me, Abraham Goldberg, a Notary Public in and for the Parish of Orleans, State of Louisiana aforesaid, and in the presence of the witnesses hereinafter named and undersigned,

Personally came and appeared the several persons whose names are hereunto subscribed, who severally declared that availing themselves of the laws of the State of Louisiana in such cases made and provided, they have covenanted and agreed and do by these presents covenant and agree and bind themselves, as well as all such persons as may hereafter become associated with them, to form a corporation for the objects and purposes and under the articles and stipulations following, to-wit:

ARTICLE I.

The name of this corporation shall be "New Orleans and San Francisco Railroad Company," and under its said corporate name it shall have power and authority to have and enjoy corporate existence and succession for the full term and period of ninety-
86 nine years from and after the date hereof; to contract, sue and be sued, to make and use a corporate seal, and the same to alter and break at pleasure; to hold, receive, lease, purchase and convey, as well as mortgage and hypothecate, property, real, personal and mixed, corporeal and incorporeal; to name and appoint such managers, agents, directors and officers as its business, interest and convenience may require, and to make and establish, as well as alter and amend, from time to time, such by-laws, rules and regulations for the proper government of the affairs of said corporation as may be necessary and proper.

ARTICLE II.

The domicile of said corporation shall be in the City of New Orleans, State of Louisiana, and all citations or other legal process shall be served upon the president of said corporation, or in the event of his absence, upon the vice-president thereof, and in the absence of both of said officers upon the secretary of said corporation.

ARTICLE III.

The objects and purposes for which this corporation is established, and the nature of the business to be carried on by it, are hereby declared to be to construct, or otherwise acquire, maintain and operate for the carriage of passengers, freight, mail and express matters, a main line of railway with one or more tracks from some point in or near the City of New Orleans, to the northern or northwestern boundary of the State, and thence through the States of Arkansas, Missouri and Illinois to the City of Chicago, upon such lines as may hereafter be selected by the Company, with all necessary spurs, side tracks, switches, turnouts, water tanks, sand and gravel pits, stations, yards and depots, roundhouses, shops, coal chutes, warehouses, platforms, ferries, bridges and other ad-
87 juncts and appurtenances necessary, proper and convenient for the operation of said main line of railway; to locate, construct or otherwise acquire and operate, with all necessary appurtenances, connecting lines of railway from such points on said main line as the Company may select to other points in the State of Louisiana, or in any other State or Territory of the United States, or in the Republic of Mexico, or in the Dominion of Canada; to lease, or to sell, its lines of railways, in whole or in part, to other companies; to lease other railways in whole or in part; to purchase or consolidate with other railway corporations organized under the laws of the State of Louisiana or of any other State, or of the United States, and to acquire and hold the stocks, bonds and securities of such other railway corporations; to guarantee the stocks, bonds and securities of such railway corporations as it may be interested in; to construct and maintain passenger depots and freight yards, and to permit the use of such depots as union depots; to construct, own and operate steamships and other vessels for the carriage of freight and passengers for hire; to construct, own and operate docks and wharves for the landing of vessels and for the receiving, storing and forwarding of freight and the accommodation of passengers; to construct, own and operate warehouses, grain elevators and compresses; to store grain and other commodities for hire, and to compress and handle cotton for hire; to open and work mines; to establish telegraph and telephone lines, to establish electric plants and to generate and distribute electricity for hire, for light, heat and power purposes; to construct or otherwise acquire, maintain and operate canals for navigation; to develop generally the agricultural interests of the State of Louisiana and of the various States and Territories through which its main or connect-

ing lines may run; and generally to hold and exercise all such incidental powers and privileges as relate to the objects hereinbefore set forth.

88 ARTICLE IV.

The capital stock of said corporation is hereby fixed at the sum of five million dollars ($5,000,000), divided into and represented by fifty thousand (50,000) shares of stock of the sum of one hundred dollars ($100) each. Said stock shall be paid for in cash, at such time, in such amounts and after such notice to the subscribers, as may be fixed by the Board of Directors, or the same may be issued at not less than par for labor done, or property actually received by the corporation.

The corporation shall become a going concern and be authorized to do business as soon as six thousand dollars ($6,000) of its capital stock shall have been subscribed for.

ARTICLE V.

All the corporate powers of said corporation shall be vested in and exercised by a Board of Directors to be composed of five stockholders, to be elected annually on the second Monday in February in each year, except the first board appointed in this charter, who shall hold their offices until the second Monday in February, 1904.

All such elections shall be held by ballot and conducted at the office of said corporation, under the supervision of three commissioners to be appointed by the Board of Directors.

Notice of such election shall be given by the Secretary of the Company by publication for not less than ten days prior thereto in a newspaper published in the City of New Orleans.

At all such elections and at all corporate meetings, every stockholder shall be entitled to one vote for each share of stock standing in his name on the books of the Company, to be cast in person or by his written proxy, and a majority of the votes cast shall elect.

89 Any vacancy occurring among the directors by death, resignation or otherwise, shall be filled by election for the remainder of the term by the remaining directors.

A failure to elect directors on the date above specified shall not dissolve the corporation, nor impair its corporate management, but the directors then in office shall remain in office until their successors are elected and qualified.

The Board of Directors shall elect from their own number a President and two or more Vice-Presidents. They shall also elect a Secretary and a Treasurer, or one person who shall be both, either of whom may or may not be members of the Board. They may from time to time name and appoint all such other officers and agents as they may deem necessary for the purpose and business of the corporation. They shall have power to fix and define the duties of every officer and employee, and all officers and employees shall hold office and employment at the pleasure of the Board. The Board may make

and establish, as well as alter and amend, any and all by-laws, rules and regulations necessary and proper in its judgment for the conduct, support and management of the business and affairs of said corporation.

The Board shall have full power and authority to borrow money, to execute mortgages and to create liens; to issue bonds, notes and other obligations, and generally to do all things reasonable, convenient and necessary for the proper carrying on of the business of the corporation.

The Board may issue full-paid shares of stock for cash, or in payment of labor done or property actually received by said corporation.

The Board shall have the power to name and appoint transfer agents in financial centers to make transfers of the stock of this corporation, and under such reasonable rules and regulations
90 as the Board may establish. Stock transferred on the books of such transfer agents shall be deemed transferred on the books of the Company.

ARTICLE VI.

Whenever this corporation may be dissolved, either by limitation or from any other cause, its affairs shall be liquidated by three commissioners, to be appointed from amongst the stockholders at a general meeting of the stockholders convened for such purpose, of which meeting notice shall be given in the manner and time provided for stockholders' meetings by Article VII of this Charter, and a majority in amount of the capital stock of said Company represented at such meeting shall be requisite to elect. Said Commissioners shall remain in office until the affairs of said corporation shall have been fully liquidated. In case of death of one or more of said commissioners the vacancy shall be filled by election by the surviving commissioners.

ARTICLE VII.

This act of incorporation may be modified, changed or altered, or said corporation may be dissolved with the assent of three-fourths of the capital stock represented at a general meeting of the stockholders convened for such purposes, and after notice shall have been given in one or more newspapers published in the City of New Orleans, once a week for four weeks preceding the meeting and by a written notice to each stockholder, mailed to him thirty days prior to the date of meeting, at the post office address designated by him in writing.

Any changes proposed or made in reference to the capital stock shall be made in accordance with the laws of the State of Louisiana on the subject of altering the capital stock of corporations.

91 ARTICLE VIII.

No stockholder shall ever be held liable for the contracts or faults of said corporation in any further sum than the unpaid balance due the corporation on the shares of stock owned by him, nor shall any

mere informality in organization have the effect of rendering this charter null, or of exposing a stockholder to any liability beyond the unpaid amount remaining due on his stock.

ARTICLE IX.

Louis S. Berg, Benjamin L. Winchell, Ivy T. Preston, Edgar H. Farrar and Ernest B. Kruttschnitt have been chosen and selected as the first Board of Directors of this corporation, to serve as such until the second Monday in February, 1904, or until their successors shall have been elected and qualified.

The subscribers hereto have respectively written opposite their names the amount of stock in this corporation subscribed for by each of them, so that this act of incorporation may also serve as the original subscription list of said corporation.

Thus done and passed at my office, in the City of New Orleans, in the presence of Messrs. H. H. Waters and Wm. R. Mason, competent witnesses, of lawful age, both of this city, who hereunto sign their names with the said appearers and me, notary, on the day and date aforesaid, after due reading of the whole.

(Original signed) BENJAMIN L. WINCHELL,
10 shares, $1,000.00.
EDGAR H. FARRAR,
10 shares, $1,000.00.
E. B. KRUTTSCHNITT,
10 shares, $1,000.00.
LOUIS S. BERG,
10 shares, $1,000.00.
IVY T. PRESTON,
10 shares, $1,000.00.
WILL H. LYFORD,
10 shares, $1,000.00.

Witnesses:
H. H. WATERS.
WM. R. MASON.

92 ABRAHAM GOLDBERG,
Notary Public.

I, the undersigned Recorder of Mortgages, in and for the Parish of Orleans, State of Louisiana, do hereby certify that the above and foregoing act of incorporation of the "New Orleans and San Francisco Railroad Company" was this day recorded in my office in Book 750, folio 24.

New Orleans, January 2, 1903.

EMILE LEONARD,
Deputy Recorder.

I, the undersigned Notary Public, do hereby certify that the above and foregoing is a true and correct copy of the original act of incorporation of the "New Orleans and San Francisco Railroad Com-

pany," on file and on record in my office, together with the certificate from the Deputy Recorder of Mortgages thereto attached.

Witness my hand and seal this day — of ——, A. D. 1903.

——— ———, *Not. Pub.*

93 *Amendments to Articles I, IV, V and IX of the Charter of the New Orleans and San Francisco Railroad Co.*

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
PARISH OF ORLEANS, CITY OF NEW ORLEANS.

Be It Known, That on this thirtieth day of the month of June, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States of America the one hundred and twenty-seventh—

Before me, Abraham Goldberg, a notary public, duly commissioned, sworn and qualified in and for the Parish of Orleans, State of Louisiana, and in the presence of the witnesses hereinafter named and undersigned—

Personally came and appeared Benjamin F. Winchell, Louis S. Berg, Will H. Lyford, Edgar H. Farrar, Ernest B. Kruttschnitt and Ivy T. Preston, who declared that a general meeting of the stockholders of the New Orleans and San Francisco Railroad Company, a corporation created under the laws of the State of Louisiana, as per acts of incorporation executed before the undersigned notary, on the 31st day of December, 1902, and recorded in the Mortgage Office of this Parish, in Book 750, folio 24, was held this day, June 30, 1903, at 12 o'clock, at the office of said Company, in the City of New Orleans, after due notice had been duly given in The Times-Democrat by continuous publication in said newspaper from the 17th day of May, 1903, to the 30th day of June, 1903, inclusive, and by a written notice mailed to each stockholder, at his post office address, designated by him in writing, more than forty days before the date of said meeting, said stockholders' meeting having been called to amend Articles I, IV, V and IX, of the charter of said Company, and for other purposes.

94 That at said meeting of stockholders, so held on this 30th day of June, 1903, at 12 o'clock, it was resolved, by the unanimous vote of all the stockholders of said Company, that Articles I, IV, V and IX of the charter of the said New Orleans and San Francisco Railroad Company should be amended so as to read as follows:

"ARTICLE I.

"The name of this corporation shall be 'New Orleans Terminal Company,' and under its corporate name it shall have power and authority to have and enjoy corporate existence and succession for the full term and period of ninety-nine years from and after the date hereof, to contract, sue and be sued, to make and use a corporate seal, and the same to alter and break at pleasure; to hold, receive, lease, purchase and convey, as well as mortgage and hypothecate, property,

real, personal and mixed, corporeal and incorporeal; to name and appoint such managers, agents, directors and officers as its business, interest and convenience may require, and to make and establish as well as alter and amend, from time to time, such by-laws, rules and regulations for the proper government of the affairs of said corporation as may be necessary and proper."

"ARTICLE IV.

"The capital stock of said corporation is hereby fixed at the sum of two million dollars ($2,000,000.00), divided into and represented by twenty thousand (20,000) shares of stock of the sum of one hundred dollars ($100.00) each. Said stock shall be paid for in cash, at such time, in such amounts, and after such notice to the subscribers as may be fixed by the Board of Directors, or the same may be issued at not less than par for labor done, or property actually received by the corporation.

95 "The corporation shall become a going concern and be authorized to do business as soon as six thousand dollars ($6,000.00) of its capital stock shall have been subscribed for."

"ARTICLE V.

"All the corporate powers of said corporation shall be vested in and exercised by a Board of Directors, to be composed of six stockholders, to be elected annually on the second Monday in February in each year, except the first Board appointed in this charter, who shall hold their offices until the second Monday in February, 1904.

"All such elections shall be held by ballot and conducted at the office of said corporation, under the supervision of three commissioners to be appointed by the Board of Directors.

"Notice of such election shall be given by the Secretary of the Company by publication for not less than ten days prior thereto in a newspaper published in the City of New Orleans.

"At all such elections and at all corporate meetings every stockholder shall be entitled to one vote for each share of stock standing in his name on the books of the Company, to be cast in person or by his written proxy, and a majority of the votes cast shall elect.

"Any vacancy occurring among the directors by death, resignation or otherwise, shall be filled by election for the remainder of the term by the remaining directors.

"A failure to elect directors on the date above specified shall not dissolve the corporation nor impair its corporate management, but the directors then in office shall remain in office until their successors are elected and qualified.

"The Board of Directors shall elect from their own number a President and two or more Vice-Presidents. They shall also elect a Secretary and Treasurer, or one person who shall be both,

96 either of whom may or may not be members of the Board. They may from time to time name and appoint all such other officers and agents as it may deem necessary for the purpose and business of the corporation. They shall have power to fix and define the duties of every officer and employee, and all officers and employees shall hold office and employment at the pleasure of the

Board. The Board may make and establish, as well as alter and amend, any and all by-laws, rules and regulations necessary and proper in its judgment for the conduct, support and management of the business and affairs of said corporation.

"The Board shall have full power and authority to borrow money, to execute mortgages and to create liens; to issue bonds, notes and other obligations, and generally to do all things reasonable, convenient and necessary for the proper carrying on the business of the corporation.

"The Board may issue full-paid shares of stock for cash, or in payment of labor done or property actually received by said corporation.

"The Board shall have the power to name and appoint transfer agents in financial centres to make transfers of the stock of this corporation, and under such reasonable rules and regulations as the Board may establish. Stock transferred on the books of such transfer agents shall be deemed transferred on the books of the Company."

"ARTICLE IX.

"Louis S. Berg, Benjamin L. Winchell, Ivy T. Preston, Edgar H. Farrar, Ernest B. Kruttschnitt and W. H. Lyford have been chosen and selected as the first Board of Directors of this corporation, to serve as such until the second Monday in February, 1904, or until their successors shall have been elected and qualified.

97 "The subscribers hereto have respectfully written opposite their names the amount of stock in this corporation subscribed for by each of them, so that this act of incorporation may also serve as the original subscription list of said corporation."

That at said meeting of stockholders it was further resolved that all of the stockholders of the New Orleans and San Francisco Railroad Company should appear before the undersigned notary and put all the said amendments into the form of a notarial act, and that the parties make this appearance and execute this act for the purpose of carrying out the resolution adopted at the said meeting of stockholders, and annex to this act certified copies of the resolution adopted at said stockholders' meeting, for all the purposes above set forth.

Thus done and passed at my office, in the City of New Orleans, on the day, month and year first above written, in the presence of Messrs. H. H. Waters and A. R. Beary, competent witnesses, who have hereunto signed their names, together with the said appearers and me, notary, after due reading of the whole.

(Original Signed) BENJAMIN L. WINCHELL.
LOUIS S. BERG.
WILL H. LYFORD.
EDGAR H. FARRAR.
ERNEST B. KRUTTSCHNITT.
IVY T. PRESTON.

Witnesses:
H. H. WATERS.
A. R. BEARY.

[SEAL.] ABRAHAM GOLDBERG,
Notary Public.

98 I, the undersigned Recorder of Mortgages, in and for the Parish of Orleans, States of Louisiana, do hereby certify that the above and foregoing amendment of Articles I, IV, V and IX of the Charter of the New Orleans and San Francisco Railroad Company was this day duly recorded in my office, in Book 750, folio 465.

EMILE LEONARD,
Deputy Recorder.

New Orleans, June 30, 1903.

I, the undersigned Notary Public, do hereby certify that the above and foregoing is a true and correct copy of the original act of amendment to Articles I, IV, V and IX of the Charter of the New Orleans and San Francisco Railroad Company, on file and on record in my office, together with the certificates of the Deputy Recorder of Mortgages thereto attached.

Witness my hand and seal, this — day of ——, 1903.

——— ———,
Not. Pub.

99 *Affidavit for Defendant.*

Affidavit of Ephraim Simon. Filed May 6, 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13300. In Equity.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

Ephraim Simon, being duly sworn, deposes and says:

That he now supplements his former affidavit filed in this cause;

That he is a manufacturer and merchant in the City of New Orleans; that he has been repeatedly applied to by the agents of the Southern Railway Company, or those representing themselves to be its agents, soliciting on behalf of said railway company, shipments of merchandise over its line of railway and its connecting carriers, with whom your deponent believes it has traffic arrangements;

That your deponent has, as a matter of fact, shipped out of the City of New Orleans merchandise, and has received from those holding themselves out to be the representatives of said railway company, bills of lading for said shipments; and that he has purchased in the City of New Orleans railway transportation over the southern railway from those holding themselves out as representatives of said Southern Railway.

And deponent further says that he is advised, informed and believes, and so avers the fact to be, from representations made by J. C. Andrews, of this City, that he is the local representative and agent of said Southern Railway System in the City of New Orleans,

employed by it and compensated by said Southern Railway Company for the services performed; and deponent further says that he is advised, informed and believes, and therefore avers the fact to be, that —— Graham, is the freight soliciting agent of the Southern Railway Company in the City of New Orleans, representing said company, soliciting business in its behalf and at times entering
100 into contracts in the City of New Orleans on behalf and for account of said Southern Railway Company;

That he is advised, informed and believes, and therefore avers the fact to be that said Southern Railway Company does business in the City of New Orleans and has done business for some time past, and has its agents and representatives in this city transacting business for and in its behalf.

Further, deponent sayeth not.

(Signed) E. SIMON.

Sworn to and subscribed before me this 25th day of March 1905.

(Signed) H. MICHEL,
Not. Pub.

101 *Submission of Rule for Injunction.*

Extract from the Minutes.

April Term, 1905.

NEW ORLEANS, SATURDAY, *May* 6, 1905.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

This cause came on to be further heard upon the motion of complainant for an injunction herein.

H. H. Hall appearing for the Complainant.
H. L. Lazarus for the defendant.

Whereupon counsel for the respective parties offered affidavits and evidence, and same was filed.

The cause was then argued by the Solicitors and submitted when the Court took time to consider.

102 *Note of Evidence. Filed June 7, 1905.*

SOUTHERN RAILWAY COMPANY
vs.
E. SIMON.

Note of Evidence.

By Mr. HALL: On behalf of the complainant, I offer in evidence the affidavit annexed to the bill of complaint, marked Exhibit "A."

Objection by Judge LAZARUS: Counsel for the defendant objects to the consideration by the court of the affidavit annexed to the bill, on the ground that the affidavit attached to the Bill was made prior to the filing of the Bill, and, therefore, is not an affidavit in this cause; that the affidavit bears date the 31st of January 1905, and the clerk's endorsements shows the filing of the Bill is on February —th, 1905.

By the COURT: I will consider the matter; let the affidavit go in over the objection.

Offer by Mr. HALL: I further offer in evidence Exhibit marked "A," being a certified copy of the transcript of the proceedings had in the case in the Civil District Court for the Parish of Orleans.

I also offer in evidence: Affidavit of Dr. E. D. Martin, being "Exhibit B."

Objection by Judge LAZARUS: Counsel for the defendant now makes formal objection to the affidavit of the said Dr. E. D. Martin in so far as it involves the merits of the case in the Civil Dis-
103 trict Court,—that issue not being before the court,—and that this court is not competent to review the evidence, in the lower court.

By the COURT: Let the evidence go in over objection.

Offer by Mr. HALL: Counsel for complainant also offers in evidence affidavit of F. C. Shumate, marked Exhibit "C."

Objection by Judge LAZARUS: Counsel for the defendant objects to any affidavit being offered in evidence touching what negotiations took place prior to the entry of the judgment in this case.

By the COURT: Let it go in over objection.

Offer by Mr. HALL: Counsel for complainant further offers in evidence, affidavit of Walter Kennedy, marked "Exhibit E."

Also affidavit of the same person marked exhibit "D."

Also Affidavit of Dr. E. D. Martin, Marked Exhibit "F."

Also affidavit from the same person marked Exhibit "G."

Also affidavit of John C. Andrews "Exhibit H."

Also affidavit of H. H. Hall, marked "Exhibit I."

Also affidavit of W. W. Finley, marked "Exhibit J."

104 Also the charter of the New Orleans Terminal Company, referred to in the affidavit and marked "Exhibit X."

Also offer in evidence letter of the Secretary of State addressed to H. H. Hall, and particularly that portion to the effect that the Secretary of State received the summons and did not send it to the Southern Railway Co., but put it on the files of his office.

Closed.

105 *Note of Evidence. Filed June 7, 1905.*

Circuit Court of the United States for the Fifth Circuit, Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

Note of Evidence on Behalf of the Defendant in the Above Numbered and Entitled Cause, Hon. Charles Parlange, Judge Presiding.

Appearances.

Harry H. Hall, Esq., Solicitor for Complainant.
Henry L. Lazarus, Esq., Solicitor for Defendant.

106 Offer by Judge LAZARUS: Counsel for the defendant offers in evidence on the rule to show cause why a temporary injunction should not issue herein, deposition of Honorable Walter B. Sommerville, Judge of the Civil District Court before whom the case was tried.

Also:

Deposition of Henry L. Lazarus,
Deposition of Ephraim Simon,
Deposition of Dr. C. A. Gaudet,
Deposition of Eva E. Simon,
Deposition of Herman Michel,
Deposition of Gustave Lehman, Jr.,
Deposition of Gustave Lehman, Sr.,
Deposition of Eugene Ellis,
Deposition of Charles Morgan,
Deposition of William Adler,
Deposition of Adolph Katz,
Deposition of Herman Weil,
Deposition of Leon Schwartz,
Deposition of Felix Levy,
Deposition of S. E. Worms,
Deposition of J. H. Curtin,
Deposition of Charles H. Culbertson,
Deposition of G. Wagatha, and
Supplemental affidavit of Ephraim Simon.

Objection by Mr. HALL: Counsel for the respondent having requested counsel for complainant to permit the offer of all of his exhibits, and then object to them collectively, and not singly,
107 counsel for Complainant now objects to the offer of any of the Depositions because a general demurrer has been filed

to this bill, and, under that general demurrer, the allegations and averments of the Bill cannot be contradicted until the demurrer is disposed of; and, while it is pending and undetermined, no evidence can be offered on this application.

Whereupon, Mr. Lazarus, Counsel for respondent temporarily withdraws the demurrer.

108 *Memorandum of Reasons. Filed* —— *9th,* 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

Memorandum of Reasons.

June 9, 1905.

(Dictated.)

A restraining order having heretofore issued herein, the matter now before the Court is whether or not a preliminary injunction shall issue.

The main contention on behalf of the defendant, is that this court is precluded from issuing an injunction in this cause because of the prohibition of Sec. 720 Rev. Stats.

It is thoroughly settled that the statute just mentioned has no application to such a cause as the instant one. See Massie *et al. vs.* Buck 128 Fed. Rep. 27, settling the question in this Circuit. See authorities cited in that case. See National Surety Company, etc., *vs.* State Bank, etc. (C. C. A. 8th Circuit), 120 Fed. Rep. 593; Terre Haute, &c., Co. *vs.* Peoria &c. Company, 82 Fed. Rep. 943; Garner *vs.* Second Nat. Bank, &c. (C. C. A. 1st Circuit), 67 Fed. Rep. 833. Circuit Judge McCormick, in Central Trust Company *vs.* St. Louis &c. Company, 59 Fed. Rep. 386; Julian *vs.* Central Trust Co. 193 U. S. 112, and other cases.

Section 720 Rev. Stats. applies only to cases where the jurisdiction of the state court has attached first. Justice Field, in Sharon *vs.* Terry, 36 Fed. Rep. 365; Justice McKenna in President &c. *vs.* Merritt *et al.*, 59 Fed. Rep. 7; Lanning *vs.* Osborne, 79 Fed. Rep. 662, and other cases. Notice Whitney *vs.* Wilder (C. C. A. 5th Circuit), 54 Fed. Rep. 554.

In the Federal Courts, a trial judge, in such a cause as the instant one, has the right in the exercise of a sound discretion to issue a preliminary injunction in order to preserve the *status quo* until the final determination of the cause. Circuit Judge Shelby in Massie *vs.* Buck, *supra;* Railroad Commission &c. *vs.* Rosebaum &c. Company, 130 Fed. Rep. 110; Northern Securities Com-
109 pany *vs.* Harriman, 134 Fed. Rep. 331; Kerr *vs.* New Orleans, 126 Fed. Rep. 924.

The meaning of Section 720 Rev. Stats. is perfectly plain. That statute was intended only to prohibit the Federal Courts from attempting to act as Courts of review over the State Courts. But Congress never intended that the Federal Courts in matters of which they have jurisdiction, should be deprived of any power of injunction necessary for the assertion and maintenance of that jurisdiction. The Federal Courts would be infirm and impotent indeed if, when causes are brought to them which they are competent to decide they could not afford the ancillary protection without which the relief sought in the causes could not be given. In such cases, the Federal courts certainly have the same powers that the State Courts would have if the causes were brought to them.

It was conceded in the argument—and the matter is obvious without the concession—that the complainant in this cause could have brought this action in the State Court, coupling therewith a prayer for an injunction. This being unquestionably true, why cannot the complainant, being a citizen of another state, apply to this court and obtain from it the same remedies which the State Court would grant it?

The present action was brought first to this Court. That action is not now pending in the State Court and has never been in that Court.

The matter is so clear that further discussion of it would be futile.

Notice that the case of National Surety Company &c. *vs.* State Bank &c. (C. C. A. 8th Circuit), 120 Fed. Rep. 593—cited *supra*—is very similar to the instant cause.

Other secondary matters urged on behalf of the defendant are either without force or else are questions which do not properly arise at the present stage of the litigation.

A preliminary injunction will issue on complainant's giving bond with security in the sum of $2000,—the restraining order to remain in force until the issuance of the preliminary injunction.

110 *Order Granting Preliminary Injunction. Filed June 9, 1905.*

U. S. Circuit Court, Eastern District of Louisiana. In Equity.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

This cause came on at this term to be heard upon the application of the Complainant for a preliminary Injunction, and after hearing the pleadings, affidavits, exhibits and evidence offered, and the arguments of Counsel for the respective parties, was submitted to the Court and the Court took the same under advisement:

Whereupon, after duly considering the same, it is now ordered by the Court, for the reasons assigned in writing and filed this day, that the application of the Complainant for a Preliminary Injunction be granted, and that a preliminary Injunction do issue as prayed for in the Bill of Complaint upon the Complainant giving Bond with security in the sum of $2000.

It is further ordered that the restraining order heretofore issued remain in force until the issuance of the preliminary Injunction.

New Orleans, La., June 9th, 1905.

CHARLES PARLANGE,
U. S. Judge.

111 *Order Appointing Special Master. Filed June* 10, 1905.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

The Court hereby appoints Hon. Charles F. Buck to be Special Master in Chancery in this cause with all the powers possessed by Masters in Chancery.

This cause is now referred to him and he is specially authorized and directed to hear and take all testimony and evidence in this cause and to report the same to this Court together with his findings of law and fact on any and all matters which may come before him in this cause.

New Orleans, La., June 10th, 1905.

(Signed) CHARLES PARLANGE.
U. S. Judge.

112 *Acceptance of Appointment as Special Master. Filed June 14, 1905.*

Buck, Walshe & Buck.

Chas. F. Buck. Geo. C. Walshe. Chas. F. Buck, Jr.

Law Office, Masonic Temple, Rooms 16-17.

Telephone 1389.

NEW ORLEANS, LA., 6/13/1905.

U. S. Circuit Court, Eastern Dist. of Louisiana.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

To H. J. Carter, Esq., Clerk of said Court.

DEAR SIR: I beg to acknowledge receipt of copy of order certified by you entered by Honorable Chas. Parlange Judge in the Circuit Court, in the above entitled cause and appointing me Special Master in Chancery.

Having no interest or connection with said cause which would prevent me acting in said capacity I accept the trust and notify you accordingly. Will you kindly transmit to me the record in the cause, and permit me to remain,

Yours very truly,

(Signed) CHARLES F. BUCK.

113 *Bond of Injunction. Filed Jun- 17, 1905.*

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

Bond of Injunction.

Know all men by these presents, That we The Southern Railway Company as principal and Fidelity and Deposit Company of Maryland as security, of the City of New Orleans, and State of Louisiana, are held and firmly bound unto Ephraim Simon in the sum of Two Thousand Dollars lawful money of the United States of America, to be paid to said Ephraim Simon heirs, executors, administrators and

assigns, for which payments well and truly to be made, we bind ourselves and each of us, by himself and each of our heirs, executors, administrators, firmly by these presents.

Sealed with our seals and dated the 16th day of Jun- in the year of our Lord 1905.

Whereas, the said Southern Railway Company has obtained from the U. S. Circuit Court 5th Circuit E. Dist. of La. a decree for a writ of Injunction upon furnishing bond in the sum of $2000. in suit Southern Railway Co. *vs.* Ephraim Simon No. 13300 of the Docket.

Now, the condition of the above obligation is, That we, the above bound Southern Railway Company and Fidelity & Deposit Company of Md. will well and truly pay to the said Ephraim Simon the defendant in said suit all such damages as he may recover against us, in case it should be decided that the injunction was wrongfully obtained.

Signed, sealed and delivered in presence of

(Signed) SOUTHERN RAILWAY CO., [SEAL.]
" By HARRY H. HALL, *Att'y.*
" FIDELITY & DEPOSIT CO. OF MD., [SEAL.]
" By P. M. MILNER, *Local Director.*

Attest.

(Signed) WARNER & BLACK, [SEAL.]
Gen'l Agents,
" By CHAS. H. BLACK.

114 *Injunction Issued to Ephraim Simon, and Marshal's Return.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

The President of the United States of America to Ephraim Simon, Greeting:

Whereas, it has been represented unto us in our said Circuit Court on the part of the Southern Railway Company in a Bill in Equity lately exhibited against you touching certain matters and things therein set forth.

Now, therefore, in consideration of the premises and of the allegations in said Bill contained, you, the said Ephraim Simon, your attorneys and each of you, are hereby commanded and strictly enjoined under the penalty of the law, that you absolutely refrain and desist

from further proceeding against Complainant, the Southern Railway Company under the suit and judgment in the suit entitled Ephraim Simon *vs.* the Southern Railway Company No. 74869 Civil District Court for the Parish of Orleans, or from issuing execution thereon or attempting thereunder to seize any property movable or immovable of said Complainant, or in any manner attempting to enforce the same and that you remain so inhibited and enjoined until the further order of our said Court in the premises.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of New Orleans, this 30th day of June in the year of our Lord, 1905.

[SEAL.] (Signed) H. J. CARTER, *Clerk.*

115 [Endorsed:] U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. No. 13300. Southern Railway Company *vs.* Ephraim Simon. Injunction to Ephraim Simon.

Marshal's Return. Filed June 30, 1905.

Received by U. S. Marshal New Orleans La. June 30/05 and on same day month and year I served copy hereof on Ephraim Simon by handing the same to him personally in New Orleans La.

(Signed) VICTOR LOISEL,
U. S. Marshal,
By T. F. LAICHE, *D'y.*

116 *Motion to Set Demurrer for Hearing. Filed July 26th,* 1905.

U. S. Circuit Court.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

On motion of Harry H. Hall of Counsel for Complainant it is ordered that Defendant's demurrer be set for hearing for — — day of —— 1905.

117 *Motion to Set Demurrer for Hearing. Filed May* 21, 1906.

U. S. Circuit Court.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

On motion of Harry H. Hall, Solicitor for complainant, it is ordered that Defendant's demurrer in the above case be set for hearing for Saturday, June 2nd, at 11 A. M.

N. O. May 19th, 1906.

118 *Stipulation as to Bond. Filed May* 25, 1906.

United States Circuit Court.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

It is hereby stipulated by Counsel for Complainant and Defendant that the injunction bond herein given by Complainant, in support of the restraining order and injunction be cancelled and the surety on the said bond released; the Defendant regarding Complainant as amply solvent and sufficient to respond to any claim or damages that its acts may have inflicted in consequence of the writ of injunction herein applied for and issued. Defendant releases said complainant from furnishing bond as directed by the Court upon the issuance of the injunction in this cause.

(Signed) HENRY L. LAZARUS,
Solicitor for E. Simon, Def't.
HARRY H. HALL,
Sol. for Compl't.

119 *Order Overruling Demurrer.*

Extract from the Minutes.

November Term, 1906.

NEW ORLEANS, SATURDAY, *December* 15, 1906.

Court met pursuant to adjournment:
Present: Hon. Charles Parlange District Judge.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

This cause came on this day to be heard upon the Demurrer of Defendant.

Harry H. Hall appearing for Complainant.

Henry L. Lazarus for Demurrant.

Whereupon after hearing counsel for the parties.

It is ordered that said Demurrer be overruled and that the defendant be allowed until the First Monday in February 1907 time in which to plead or file his answer.

120 *Order Correcting Order of December* 15, 1906.

Extract from the Minutes.

November Term, 1906.

NEW ORLEANS, WEDNESDAY, *December* 19, 1906.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, District Judge.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRAIM SIMON.

On motion of H. L. Lazarus of Counsel for defendant and on suggesting that through error the Clerk in making the entry in this cause on Dec. 15, 1906, allowing time to the defendant, entered the order as only allowing the defendant time to answer when the defendant should have been allowed time to plead or answer.

It is ordered that the Minutes of said date in said cause be amended to read as follows: "that the defendant be allowed until the First Monday in February, 1907, time in which to plead or file his answer.

121 *Plea. Filed February* 5, 1907.

In the Circuit Court of the United States for the Eastern District of Louisiana. In Equity.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

The Plea of the Above-named Defendant, Ephraim Simon, to the Bill of Complaint of the Above-named Complainant, The Southern Railway Company.

I, the defendant, Ephraim Simon, by protestation, not confessing or acknowledging all or any part of the matters or things in the said Bill of Complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, do plead thereto, and for plea say:

1. That the Circuit Court of the United States is without jurisdiction to grant the relief herein sought, or an injunction directed against the defendant in this cause, or his agents or attorneys, in-

asmuch as the judgment rendered in the cause of Ephraim Simon against the Southern Railway Company, No. — of the Civil District Court, was rendered by a Judge of a State Court seized with jurisdiction of said cause, and who, in the exercise of his judicial functions, was authorized and empowered to render judgment in the cause, and which judgment so rendered is reviewable alone by the Supreme Court of Louisiana, and, upon proper issued framed, could be the basis of a writ of error to the Supreme Court of the United States, and that any attempt upon the part of the Circuit Court to set aside a judgment of the State Court is beyond its jurisdiction, and

that any injunction issued, preliminarily or finally against
122 the issuance of process according to the laws of the State of Louisiana upon a judgment so rendered by a State Court is violative of the Constitution of the United States, and particularly of Section No. 720 of the Revised Statutes of the United States. The operative effect of said Section No. 720 of the Revised Statutes being a bar to plaintiff's present bill of complaint, and to the process of injunction sought therein.

2. That the Circuit Court of the United States is without power or jurisdiction to review, revise or set aside the judgment and decree rendered in the cause of Ephraim Simon *vs.* Southern Railway Company, set out in the Bill of Complaint herein and which judgment was rendered by the Honorable the Civil District Court for the Parish of Orleans a part of the judiciary of the State of Louisiana, with jurisdiction to hear and determine said cause, and that the said Court, whose judgment is herein assailed had full and complete jurisdiction of the parties and subject matter of the controversy herein.

3. That the Circuit Court of the United States is without power and jurisdiction to review constitutional questions raised in a proceeding attacking the validity of a judgment of a State when the State Court had jurisdiction of the cause, *rationa-materiae et personae*, and that said constitutional question so agitated in the Bill of Complaint herein cannot be raised, heard or determined in this cause, which is an independent injunction bill to restrain the effective force and operation of a judgment of a State Court, the Complainant herein having full and ample remedy for relief, primarily in the Courts of Louisiana, and by a writ of error to the Supreme Court of the United States if the Courts of Louisiana deny to the Complainant a recognition of its alleged constitutional rights.

4. That the Circuit Court of the United States is without
123 power or jurisdiction to review, revise or set aside the judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, in the cause of Ephraim Simon *vs.* The Southern Railway Company, for error, mistake or irregularity in the trial of said cause or the rendition of judgment therein, whether such error, mistake or irregularity results from the question of admissibility of evidence, the service of process or an allowance of damages which Complainant may consider excessive.

5th. That the Circuit Court of the United States is without jurisdiction to grant the Complainant any relief in this cause, for the

reasons hereinbefore recited, and that as a court of equity it will not interfere with, or grant relief against judgments alleged to have been fraudulently obtained where said Bill of Complaint does not aver and set forth the fraudulent acts complained of, and does not aver and set out at large that Complainant has a meritorious and valid defense to the main cause of action on the merits of the claim, and of which he has been unjustly and inequitably deprived.

For further plea, defendant saith, that the averments in said Bill of Complaint, concluding with the charge of fraud are vague, uncertain and indefinite, in that, the facts and circumstances which constitute said alleged fraud, are not set forth with clearness, conciseness and with sufficient particularity to enable defendant to meet said charge.

6. That the Circuit Court of the United States, sitting in equity, is without jurisdiction to interfere with judgments rendered at law in the Civil District Court for the Parish of Orleans, State of Louisiana, unless the Complainant has a defense, of which it
124 could not avail itself, or had a good and valid defense at law which it was prevented of availing itself by fraud or accident, unmixed with negligence on its part or that of its agents.

7. That the Circuit Court of the United States is without jurisdiction where the Complainant has a complete and adequate remedy in the Courts of the State of Louisiana, and where it has neglected to pursue the proper remedy laid down in the statute laws of the State either by moving timely for a new trial by appeal or by an action in nullity of judgment.

8. That the Circuit Court of the United States is without jurisdiction to entertain the said Bill of Complaint, for the reasons, that said Bill is not properly verified, in that, the affidavit in the Bill bears the date of January 31st, 1905, whereas the said Bill was not filed until February 6th, 1905, and, therefore there was no affidavit in said cause.

9. Against the further prosecution by Complainant of said cause, this defendant pleads that the depositions submitted herein were made upon information and belief, and are insufficient for the issuance of said injunction, and that no affidavits were filed to sustain the alleged charges of fraud recited in the Bill of Complaint herein.

All of which matters and things, I aver to be true and plead the same to the said Bill, and humbly crave the judgment of this Honorable Court whether I ought to be compelled to make any further or other answer to the said Bill of Complaint.

(Signed) HENRY L. LAZARUS,
Solicitor for Def't.

(Sig.) LAZARUS, MICHEL & LAZARUS,
Of Counsel.

DAVID SESSLER,
Of Counsel.

125 I hereby certify that the foregoing plea is in my opinion, well founded in point of law.

New Orleans, February 4th, 1907.

(Sig.) HENRY L. LAZARUS.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Ephraim Simon, being duly sworn, deposes and says I am the defendant in the above cause, the foregoing plea is true in point of fact, and is not interposed for delay.

(Sig.) E. SIMON.

Sworn to & subscribed before me on this 4th day of February, 1907.

[SEAL.] (Sig.) H. MICHEL, *Not. Pub.*

126 *Replication to Plea. Filed April* 19, 1907.

U. S. Circuit Court.

No. 13300.

SOUTHERN RAILWAY
vs.
EPHRAIM SIMON.

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the manifold errors uncertainties and insufficiencies of the plea of said defendant, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the plea of the said defendant is uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said plea contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto confessed or avoided, traversed and denied, is true; all matters and things this repliant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly pray as in its bill it hath already prayed.

(Signed) HALL & MONROE,
Solicitors for Repliant.

127 *Motion to Set Plea for Hearing. Filed May* 21, 1907.

U. S. Circuit Court.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

On motion of Hall & Monroe Solicitors for complainant it is ordered that Defendant's plea herein be set for hearing on the 27th day of May 1907 at 11 A. M.

128 *Hearing and Order Overruling Plea & Allowing Defendant Until First Monday in August to Further Plead or Answer.*

Extract from the Minutes.

April Term, 1907.

NEW ORLEANS, MONDAY, *May 27th*, 1907.

Court met pursuant to adjournment.
Present: Hon. Eugene D. Saunders, District Judge.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

This cause came on this day to be heard upon the Plea of the defendant filed herein on February 5, 1907.

After hearing argument of counsel it was ordered by the Court that said plea be overruled, and that the defendant be allowed until the first Monday in August, 1907, to further plead or answer.

129 *Answer. Filed August* 5, 1907.

United States Circuit Court, Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

The Answer of Ephraim Simon to the Bill of Complaint of the Southern Railway Company, Plaintiff.

Now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can be had

or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised is material and necessary for him to answer to, answering sayeth:

That he herein renews and specially pleads the general demurrer heretofore filed to the plaintiff's bill of complaint and his plea to the jurisdiction of the Court, the said demurrer and plea to be treated in this answer as though set forth *in extenso*, respectfully protesting against the action of the Court heretofore had upon the aforesaid demurrer and plea to the jurisdiction.

And for further plea in bar of the prosecution for the causes assigned in the bill of complaint herein, this respondent sayeth; that the issues sought to be raised by the bill of complaint herein were and are foreclosed and barred from further inquiry or prosecution under and by virtue of the judgment rendered in the cause entitled Ephraim Simon *vs.* Southern Railway Company, No. 74864 of the docket of the Civil District Court, in which all the issues now sought to be reviewed by plaintiff's bill of complaint, were
130 determined and adjudged, and which judgment is conclusive and final of any inquiry herein, and which judgment of record in said cause is annexed to and forms part of plaintiff's bill of complaint as an exhibit, and which judgment this respondent pleads as *res adjudicata* of the issues sought to be reviewed in this cause, and respondent pleads the said judgment in bar of the further prosecution of this case and demands as of right that the bill of complaint herein be dismissed.

And now, without prejudice to the pleas heretofore interposed to the further prosecution of this cause, this respondent answering the bill of complaint says:

First. That admitting that the complainant, the Southern Railway Company, is a corporation organized and existing under the laws of the State of Virginia, he is neither advised nor informed whether it is empowered to operate a line of railway in the State of Louisiana.

Second. That Ephraim Simon, the respondent in this cause, was at the time of the filing of the bill, and presently is, a citizen of the State of Louisiana.

Third. That it is true, as averred, that the respondent, Ephraim Simon was a passenger upon one of complainant's trains and was injured in consequence of a collision; the injuries, however, described in said bill, are not correctly stated, and the charge that respondent made a false claim for damages resulting from said collision, and fixed the amount thereof at the sum of Five Thousand Dollars, is in all respects false and untrue.

That at no time did this respondent make a statement or claim of the Southern Railway for any specific amount other than that embodied in his proceedings in the Civil District Court for the Parish of Orleans against the Southern Railway Company
131 and which resulted in a judgment which is plead in bar of further inquiry in these proceedings and which is for the sum as shown by said judgment a copy of which is annexed to and made part of plaintiff's bill of complaint.

It is not true, as averred in said bill, that there was any understanding that negotiations which were opened by the Southern Railway Company looking to an adjustment without litigation of the damages sustained by respondent were held in suspense. The fact and truth is that preliminary negotiations with respondent's counsel were terminated and the said railway company advised and informed that proceedings would be at once taken to recover full indemnity for the injuries sustained.

Fourth. That it is not true, as averred in said bill, that this respondent or his counsel at any time left the complainant in the belief that respondent was considering the proposition to adjust a settlement for the injuries sustained, or that the respondent would submit any further or other offer of settlement; but that the fact and the truth is that the negotiations between respondent's counsel and the company, so respondent is informed and believes, terminated abruptly with the distinct statement by respondent's counsel that proceedings would be immediately instituted for the recovery of the damages sustained in consequence of the injuries suffered by respondent, and that in pursuance of said information so communicated, proceedings were instituted by this respondent against the complainant herein in the Civil District Court for the Parish of Orleans; that the said cause was openly docketed reported in the daily court report published of court proceedings in the Parish of Orleans and published in the daily press and that the charge in said bill that said suit was surreptitiously entered is malicious, false and untrue; and the further charge contained in the para-
132 graph referred to that your respondent made false and fraudulent claims is malicious and unwarranted, and the award by a jury duly empaneled in the Civil District Court to try the issues in the cause of this respondent against the Southern Railway Company, and the judgment of the Civil District Court finding independently of the verdict of the jury that the damages sustained had been proved and for which judgment was accordingly rendered, is conclusive of all *injury* (inquiry) in this Court, and could only be attacked in the Civil District Court within the time prescribed by law for actions of nullity on the ground that said judgment was procured and rendered by the administration of false evidence.

Fifth. The recitals contained in this paragraph of complainant's bill are substantially true, the citation to the Southern Railway Company having been served upon the Secretary of the State of Louisiana, in the absence of an agent designated by the Southern Railway Company upon whom process could be served, and the said Southern Railway Company doing business in this State subject to the jurisdiction of the State Courts through process served upon the Secretary of State under the provisions of Act No. 54 of 1904.

Sixth. Your respondent is not advised whether the Southern Railway Company has any of its "lines of railway enter or traverse any part of the said State." Respondent admits that it is a foreign corporation, and the verdict of the jury and the judgment of the Court rendered in the case of Ephraim Simon *vs.* Southern Railway Company No. 74864 of the docket of the Civil District Court for the

Parish of Orleans, forecloses and concludes the inquiry as to whether it was transacting business in the State of Louisiana at the time of the service of process made in the cause above referred to upon the Secretary of State who by law was designated in the absence
133 of a specially appointed agent upon whom process should be served for and on behalf of said Southern Railway Company; and that said legislation is valid and process served in accordance with the directions thereof is binding and effective and is not an attempted regulation of commerce, nor is the said statute in violation of the constitution of the United States.

Seventh. The failure of the Southern Railway Company, within the legal delays to appear and defend the cause of action of Simon *vs.* Southern Railway Company in the Civil District Court for the Parish of Orleans, entitled this respondent to his default and to the confirmation thereof, and all the delays allowed by law were accorded to the Southern Railway Company before either default or confirmation thereof was had, and the damages sued for in consequence of the injuries sustained were assessed in favor of this respondent and against the Southern Railway Company for the amount sued for, by a jury duly empanelled and sworn, and the verdict of which jury having received the sanction of the judge presiding who had jurisdiction *ratione materiae et ratione personae*, concludes all *injury* (inquiry) as to the allowance by said judgment and the correctness thereof, this Court being without the power to review the record of proceedings had in the Civil District Court for the Parish of Orleans.

The charge in the paragraph referred to that the respondent "fraudulently caused to be entered by said jury a verdict" is malicious and false and is a conclusion without recitals of fact sufficient to inform this respondent in what respect said verdict was fraudulently entered; and that the charge contained in the second paragraph of said article that this respondent "in confirming the said default was guilty of subterfuge and fraud in claiming and adducing testimony to the effect that he had sustained damages
134 in the sum of $13,348.00 as above detailed" is a malicious and false charge, unsupported by any recitals of fact. The truth and the fact is, as the record shows that the verdict of the jury was based upon the evidence administered of a number of witnesses called and examined on behalf of respondent in reference to the injuries sustained and whose testimony was in all respects truthful, and that the jury found said verdict and the judge found that the damages sustained had been proved. That the charge is general in not detailing and specifying in what respect there was subterfuge, or in what respect there was fraud in the administration of proof, and that all injury as to the evidence administered with reference to and in the consideration of which the jury and the trial judge rendered their judgment, is conclusive in this proceeding and in this Court, and the execution of respondent's judgment against the Southern Railway Company, said judgment being final, cannot be controlled by a writ of injunction issuing from this Court, the law of the land affording and providing a full, adequate and com-

plete remedy if injury has been inflicted by said judgment, but that the remedy provided by law is not by an appeal or review of the verdict and judgment of the Civil District Court of the Parish of Orleans, State of Louisiana, to the Circuit Court of the United States for the Fifth Circuit, said court being a court of concurrent and co-ordinate jurisdiction.

Ninth. Respondent is not advised or informed whether the Secretary of State upon whom process was served in the case of Simon *vs.* Southern Railway Company, notified the said Southern Railway Company, or whether they had knowledge of the pendency of said cause, or whether it was the duty of the Secretary of State, in the absence of directions from the Southern Railway Company to notify the said Southern Railway Company, but the fact and the
135 truth is that before the judgment in the cause was signed and while there was time for the Southern Railway Company to make a motion for a new trial in said Court, the said Southern Railway Company was advised of the finding of the verdict and the rendition of the judgment and had ample time before the signing of said judgment, which is necessary under the laws of Louisiana to the rendition of a judgment, to apply for the reopening of the cause or for a new trial therein on any of the grounds provided by law for the granting of new trials, and that even after said judgment was signed, said Southern Railway Company had the right under the laws of Louisiana to prosecute its appeal from said judgment to the Supreme Court of Louisiana, and if error appeared upon the record, to prosecute its writ of error to the Supreme Court of the United States for its review of said judgment; or, under the laws of Louisiana, it had the right to institute proceedings in the Court which rendered the judgment to annul the same and there assign the right here asserted under the Constitution of the United States, which could, in the event of an adverse decision by the highest Court of the State, be removed on writ of error to the Supreme Court of the United States and have there determined the force and validity of the judgment complained of.

Tenth. Respondent says that the general charge contained in the bill that the verdict of the jury and the judgment of the Court "are unconscionable as having been rendered fraudulently and upon false testimony—and that it would be against good conscience to allow said judgment to be used to extort money that is not owing from" complainant, is a false and malicious charge, the verdict and judgment of the Civil District Court establishing the justice of plaintiff's demand and which is in recognition of the damages sustained and justly due by the complainant to respondent, the inquiry
136 as to the quantum of damage being foreclosed and concluded by the judgment aforesaid, and it nowhere appears in said general and malicious charge in what respect the said judgment is unconscionable, or that it was rendered fraudulently and upon false testimony. That it is not true as charged in said bill that plaintiff had "a complete and meritorious defense to the claim upon which said demand is based." It is nowhere indicated what defense the said Southern Railway Company had and the said charge is incon-

sistent with other parts of complainant's bill admitting that this respondent did suffer an injury in consequence of the collision which occurred upon its road while respondent was a passenger thereon, the measure of damages sustained being the only question, according to the recitals of complainant's bill; and that the question of quantum of damages having been determined by the judgment of the Civil District Court is conclusive.

Eleventh. That it is not true as charged, that complainant "was prevented from availing itself of the defense to the cause of action embodied in said proceeding and that it has been without negligence either of itself or its agent in the premises." As herein recited, the said Southern Railway Company was timely advised of the rendition of the verdict and of the judgment thereon before the signature of the judge to said judgment, and did not avail itself of the remedies pointed out by law either to reopen the cause to secure time for further consideration or by a motion for a new trial or by appeal, or by action for nullity; and that it has allowed said judgment to be signed and has allowed by the lapse of time said judgment to become final; and if the judgment herein sought to be controlled by the writ of injunction is open to collateral attack, the laches and negligence of the complainant precludes it from any relief in equity.

137 Twelfth. It is true that the respondent was in the act of issuing his writ of *fieri facias* upon the judgment which he had obtained against the Southern Railway Company and was about to seize the property of said Southern Railway Company within the jurisdiction of the Civil District Court, the said property of said company being within the jurisdiction of said Civil District Court and used by the Southern Railway Company in furtherance of the business of said Southern Railway Company operated and conducted in the State of Louisiana, when, by this Court's process the injunction, herein sought to be maintained was issued, and which has effectively up to the present time, restrained the respondent in the assertion of his rights and the use to which he is entitled of the process of the Courts of the State of Louisiana in the execution of a judgment duly and regularly rendered by a Court seized of jurisdiction *ratione materiæ et ratione personæ*, and which judgment, until reversed or annulled by a Court of competent jurisdiction, is conclusive in all other courts of concurrent and co-ordinate jurisdiction.

And this defendant denies all and all manner of unlawful, combination and confederacy wherewith he is by the said bill charged, without this that there is any other matter, cause or thing in the said plaintiff's bill of complaint contained material and necessary for this defendant to make answer thereto and not therein and hereby well and sufficiently answered, confessed, traversed or avoided, is true to the knowledge or belief of this defendant, all which matters and things this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct.

Respondent reserving his rights to claim such damage as he may have sustained in consequence of the writ in this cause, and of the

malicious and false charges preferred against him, prays,
138 (1) a reconsideration upon the final hearing of his plea to the jurisdiction; (2) consideration and allowance of his plea in bar interposed and incorporated in this answer; and upon recognition of either plea and its maintenance, that the bill of complaint herein be dismissed; and that if the Court should maintain its primary judgment on the plea to the jurisdiction and overrule the plea in bar herein which respondent says adjudges and concludes all inquiry into the judgment rendered in the cause of Simon *versus* the Southern Railway Company, then respondent prays that complainant's bill be dismissed with costs, reserving to respondent his right to sush further action as he may be advised for the issuance of the writ in this cause, and such damages as he has sustained in consequence of the recitals contained in the complainant's bill. And respondent prays for all further and necessary orders in the premises, and for general and equitable relief.

(Signed) EPHRAIM SIMON.

(Sig.) LAZARUS, MICHEL & LAZARUS,
Solicitors for Ephraim Simon, Respondent.

August 5th, 1907.

STATE OF LOUISIANA, *Parish of Orleans:*

Ephraim Simon, being duly sworn, deposes and says; That the plea in bar incorporated in his answer is not interposed for delay but he is advised is well founded in point of law. That his answer to the bill of complaint in so far as matters therein recited as of his own knowledge are true and those recited upon information and belief, he believes to be true.

(Signed) EPHRAIM SIMON.

Sworn to and subscribed before me this fifth day of August 1907.

[SEAL.] (Sig.) H. MICHEL,
Not. Pub.

139 I certify that in my opinion the plea in bar incorporated in the answer herein is well founded in point of law.

(Signed) HENRY L. LAZARUS.

New Orleans, 5/07.

140 *Replication. Filed August* 19, 1907.

U. S. Circuit Court.

No. 13300.

SOUTHERN RAILWAY
vs.
EPHRAIM SIMON.

This repliant saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the mani-

fold errors uncertainties and insufficiencies of the plea of said defendant, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the plea of the said defendant is uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said plea contained, material or effectual in law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided traversed or denied, is true: all matters and things this repliant is ready to aver, maintain and prove as this honorable Court shall direct and humbly pray- as in its bill it hath already prayed.

(Signed) HALL & MONROE,
Solicitors for Repliant.

141 *Motion to Punish for Contempt. Filed November* 11, 1907.

NOV. 9TH, 1907.

No. 13300.

SOUTHERN R'Y COMPANY
vs.
EPHRAIM SIMON.

Messrs. Lazarus, Michel & Lazarus, Solicitors, City.

GENTLEMEN: You are hereby notified that in the above entitled proceeding No. 13,300 of the Docket of the United States Court, Eastern District of Louisiana, we will, in the Court Room of said Court in this city, on the 15th day of November 1907, at 11 A. M. move that the said Ephraim Simon defendant, stand committed for breach of the injunction herein rendered and we hand you herewith copy of the said motion together with affidavit thereto, annexed, showing service of said injunction.

Yours respectfully,

(Signed) HALL & MONROE,
Solicitors for Southern Railway Co.

142 United States Circuit Court, Eastern District of La.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

On motion of Hall & Monroe, of Counsel for Plaintiff, and on suggesting that, on the bill of complaint herein, there was rendered on the 30th of June 1905, a decree of this Court enjoining Respondent Ephraim Simon, his attorneys and each of them, that they absolutely refrain and desist from further proceeding against complain-

ant, the Southern Railway Company, under a certain judgment, entitled "Ephraim Simon *vs.* Southern Railway Company, No. 74869 of the Docket of the Civil District Court for the Parish of Orleans, or from issuing execution thereon or attempting thereunder to seize the property movable or immovable of the said Complainant the Southern Railway Co., or in any manner attempting to enforce the said Judgment:

That the said judgment was personally served on the said Ephraim Simon on the 30th of June, 1903, by the Marshal of this Court:

On further suggesting, that repeatedly since the service of this injunction, the said Ephraim Simon, by his attorneys, has threatened to disobey and disregard the same and to issue execution; and that he has now deliberately and intentionally violated the said writ of injunction by causing to issue from the Civil District Court in the said proceeding, No. 74869 of its docket, a writ of *fieri facias* and has instructed the Civil Sheriff for the Parish of Orleans thereunder, to seize the property, movable and immovable of the said Southern Railway Company and has caused notices of this seizure with garnishment process to be served upon Harry H. Hall residing in this Parish, and the Canal Louisiana Bank & Trust Company and pr. annexed papers and it appearing by the annexed affidavit that due notice of this motion and of the time and place of making the same, together with affidavit of the service of injunction has been
143 given to said Ephraim Simon:

Now, therefore, the Southern Railway Company Complainant herein by its Solicitors, Messrs. Hall & Monroe, move that the said Ephraim Simon stand committed for contempt of Court and that he be punished by fine and imprisonment for deliberately and intentionally violating the said injunction and order of this Court.

(Signed) HALL & MONROE, *Sol.*

Harry H. Hall, being sworn, says that the officers of the Southern Railway Company are absent from and do not reside in this State, and that he is their Solicitor and attorney for the purposes of this proceeding and affiant says, that, as appears by the return of the United States Marshal herein, a writ of injunction was served, personally upon Ephraim Simon, respondent on the 30th of June, 1905, and that the said Ephraim Simon, by his Solicitor and Counsel Mr. Henry L. Lazarus, has repeatedly notified affiant that he intended to cause and that he had caused his said client, said Ephraim Simon to violate the injunction herein above referred to by the issuance of a writ of *fieri facias* as hereinabove set out.

(Signed) HARRY H. HALL.

Sworn to and subscribed *to* before me, this 11th day of November, 1907.

[SEAL.] (Signed) H. J. CARTER,
United States Commissioner.

144 STATE OF LOUISIANA,
Civil Sheriff's Office, Parish of Orleans:

In the Civil District Court for the Parish of Orleans.

EPHRAIM SIMON
versus
SOUTHERN RAILWAY.

To Harry H. Hall, Garnishee, New Orleans:

Please to take notice, That by virtue of a writ of *fi. fa.* issued in the above mentioned suit, I seize in your hands, all the Goods, Chattels, Lands, Tenements, Rights and Credits, Moneys, Effects, Bills of Exchange, Promissory Notes or property of any kind which you may now or hereafter have in your possession or under your control belonging to defendant, Southern Railway Company, which you will hand over to me.

(Signed) CHAS. J. JACKSON,
Deputy Sheriff.

145 STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

No. 74869.

EPHRAIM SIMON
versus
SOUTHERN RAILWAY CO.

To Harry H. Hall, Garnishee, New Orleans:

You are Hereby Cited, to declare on oath, what property belonging to the Defendant in this case you have in your possession or in what sum you are indebted to said Defendant and also to answer in writing under oath, the interrogatories annexed to the Supplemental Petition of which a copy accompanies this citation and deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans within ten days after the service hereof, otherwise judgment will be entered against you for the amount claimed by the plaintiff with interest and costs.

Witness, the Honorable W. B. Sommerville Judge of the said Court, the 8th day of November in the year of our Lord, 1907.

[SEAL.] (Signed) W. E. FEENEY,
Deputy Clerk.

146 No. 74869.

EPHRAIM SIMON
versus
SOUTHERN RAILWAY CO.

To the Honorable the Civil District Court for the Parish of Orleans:

The supplemental petition of Ephraim Simon, respectfully represents.

That he had obtained from the Clerk of this honorable Court a writ of *fieri facias* ordering the Sheriff of this Parish to seize and take into his possession the property, real and personal rights and credits of defendant Southern Railway Company and to cause to be made, in the manner prescribed by law, an amount sufficient to pay and satisfy the same viz: Thirteen thousand three hundred and forty eight ($13,348) Dollars with legal interest thereon from January 20, 1903, and costs of Court and having good reason to believe that the Canal Louisiana Bank & Trust Co. and Harry H. Hall third persons are indebted to said defendant or ha- property or effects in their possession or under their control belonging to said defendant.

Therefore, petitioner pray- that said Canal Louisiana Bank and Trust Co. of New Orleans and Harry H. Hall of New Orleans, be made garnishee herein and ordered to answer under oath to accompanying interrogatories and after all due and legal proceedings, condemned to pay the amount of said Judgment interest and costs.

(Signed) LAZARUS, MICHEL AND LAZARUS,
Attorney- for Petitioner.

Interrogatories to be Answered Categorically under Oath, in Writing, Ten Days from Service.

147 1st. Had you in your hands, or under your control, directly or indirectly, at the time of service of these interrogatories or at any time since, any money, rights, credits, or other property whatsoever, belonging or due to the said defendant in Writ or in which *is* has or had any interest for the whole or for a part; and if yea, what is the nature, description and amount thereof, and is the same sufficient to pay or to satisfy the full amount of said Judgment interest and Costs or if less, to what amount?—you being asked and required to make a full disclosure in relation to the same.

2d Interrogatory. Were you not, at the time of service upon you of these interrogatories, or since directly or indirectly indebted or obligated unto the said defendant in Writ for anything or for any sum whatever, whether for yourself alone or together with others, in consequence of any sale or exchange or transaction of any kind whatever, whether the same be due or to become due, and whether the interests of said defendant in Writ be direct or indirect, or be

for the whole or a part only or whether it be by bill, note or otherwise; and if yea, what is the nature description and amount thereof, and is the same sufficient to pay or satisfy the full amount of said Judgment, interest and Costs, or if less, what amount?—you being asked and required to make a full and detailed disclosure in relation to the same.

3d Interrogatory. Have you, at any time since the service of notice of seizure in your hands herein made, directly or indirectly, unto or with the said defendant in Writ any payment or innovation or compromise or arangement or given it any note or writtten obligation, or received from it, directly or indirectly any receipt or acquittance? and if yea, state the nature, description and amount thereof, and the time, place and circumstances of the same.

(Signed) LAZARUS, MICHEL AND LAZARUS,
Att'ys for Pet'r.

148 (On reverse side.)

Let this supplemental petition be filed and let Mr. Harry H. Hall and the Canal Louisiana Bank and Trust Company of New Orleans be made garnishee herein and ordered to answer the accompanying interrogatories, under oath; in writing, within ten days from service and as the law directs as herein prayed for.

New Orleans, Nov. 8, 1907.

(Signed) W. B. SOMMERVILLE, *Judge.*

A true copy.

[SEAL.] (Sig.) W. E. FEENEY, *D'y Cl'k.*

149 *Marshal's Return on Motion to Punish for Contempt. Filed Nov.* 12, 1907.

Received by U. S. Marshal, New Orleans, La., Nov. 11/07, 2.25 o'*lc* P. M. and on the same day I served copy hereof on Judge H. L. Lazarus, Att'y of record by handing same to him in person in N. O. La.

(Signed) VICTOR LOISEL,
U. S. Marshal,
" By T. I. GALBRETH, *D'y.*

150 *Return to Rule for Contempt. Filed November 15th,* 1907.

U. S. Circuit Court, Fifth Circuit, Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

The Answer of Ephraim Simon to a Rule Awarded Against Him by this Honorable Court.

To the Honorable the Judge of the Circuit Court of the United States for the Fifth Circuit, Eastern District of Louisiana:

By an order entered by this Court in the cause of the Southern Railway Company *versus* Ephraim Simon, summoning appearer to show cause why he should not be fined and imprisoned for disobeying the injunction heretofore awarded in said suit restraining him from proceeding against the complainant, the Southern Railway Company, in the cause depending in the Civil District Court for the Parish of Orleans, entitled Ephraim Simon *versus* Southern Railway Company, No. 74,869 of the docket thereof, or from issuing execution thereon or attempting thereunder to seize any property, movable or immovable, of complainant, or attempting in any manner to enforce the same, this respondent in answer to said summons, respectfully says:

That at all times, as in duty bound, he yields and submits himself to the orders and judgments of all courts when in the legitimate exercise of their power and jurisdiction, and this respondent protests his honesty of purpose in the assertion of his rights and disclaims any intention to treat the Court or its orders with disrespect, and here solemnly asseverates that he has been actuated alone with the desire to have the law of the land properly administered.

Respondent, for further answer, says, that he instituted a suit in the Civil District Court of the Parish of Orleans, State of Louisiana,

151 against the Southern Railway Company for indemnification and recovery of damages suffered and sustained by him in consequence of a breach of contract upon the part of said defendant company; that the said Court in which the said cause was instituted, was seized of jurisdiction *ratione materiæ et personæ:* that all the material allegations necessary to support the cause of action and the judgment rendered thereon, were, by the trial Judge decreed to have been proved, and after the observance of all legal requirements, a judgment was entered of record awarding to appearer the measure of recovery sought by him in said proceedings, all of which will more fully and at large appear by the record of the Civil District Court in the cause entitled Ephraim Simon *versus* the South-

ern Railway Company, No. 74,869 of the docket thereof, attached to, forming an exhibit in and constituting part of, mover's bill in the cause, reference to which is here craved and which he prays may be considered as part of this return.

This respondent further says that the Civil District Court for the Parish of Orleans, is a court of general jurisdiction created and organized under the Constitution and laws of the State of Louisiana and is co-ordinate with this Honorable Court in the exercise of the jurisdiction conferred on it by the Acts of Congress.

That subsequent to the rendition of the judgment aforesaid, the Southern Railway Company, asserting that it was a nonresident corporation, invoked the jurisdiction of this Court to restrain the execution of the judgment rendered by the Civil District Court in favor of appearer, and obtained a preliminary injunction from this Honorable Court restraining and enjoining this respondent from attempting to enforce the said judgment or issuing execution thereon; and that notwithstanding respondent's appearance at the Bar of this Court and pleading its want of power and jurisdiction to enjoin the execution of a judgment of the Civil District Court, this Honorable Court, in direct violation of a prohibitory statute
152 of the United States, issued its injunction and attempted thereby to control the judgment and process of the Civil District Court of the Parish of Orleans, State of Louisiana, and sought to deprive this appearer of the benefits and advantages of a judgment obtained by him in the State Court in due course of procedure, this Court thereby asserting its right of review and control of judgments of a State Court. This appearer further says that the rule herein taken and whereon complaint is made, is based upon proceedings taken by him in the execution of his said judgment, said proceedings being under the direct authority of the Honorable the Judge of the Civil District Court for the Parish of Orleans, who upon application of this respondent, granted an order of garnishment herein, with direction to those garnisheed to make due and proper return in accordance with law, all of which will more fully and at large appear by reference to a certified copy of said order hereto annexed and made part hereof as Exhibit A.

This appearer, for further answer to the summons herein says: That this Honorable Court is without power or jurisdiction to issue a writ of injunction to stay proceedings in any Court of this State, and being without power or jurisdiction to issue the writ, its breach does not constitute and cannot be construed as a contempt of the authority of this Honorable Court, and this he submits to the Court as his return for the acts herein complained of, this respondent being advised and believing that this Court was without power or authority to award the writ of injunction enjoining the execution of appearer's judgment against the Southern Railway Company; that to this return, and with the exhibit hereto annexed, he makes the record in this cause a part of his said return, and prays the Court's consideration of the same.

Supported by appearer's oath to the return made herein, he prays that the rule taken herein be discharged, and that he be at liberty

to pursue his legal rights in the Courts of the State of Louis-
153 iana, as he may be advised.
(Signed) EPHRAIM SIMON.

(Signed) HENRY L. LAZARUS,
(") H. MICHEL,
(") ELDON S. LAZARUS,
(") DAVID SESSLER,
Solicitors and of Counsel.

U. S. Circuit Court, Fifth Circuit, Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
versus
EPHRAIM SIMON.

STATE OF LOUISIANA, *Parish of Orleans:*

Ephraim Simon, being duly sworn, deposes and says, that the foregoing is his return to the summons issued herein; that all the facts stated therein of his own knowledge, are true; that those upon information and belief, he believes to be true; and that he avowedly disclaims any intention of disrespect of the authority of this Court.
(Signed) EPHRAIM SIMON.

Sworn to and subscribed before me this 15 day of November, 1907.
(Signed) H. J. CARTER,
U. S. Commissioner.

I certify that in my opinion the return made herein is good and sufficient in law.
(Signed) HENRY L. LAZARUS,
Of Counsel.

Nov. 15, '07.

154 EXHIBIT A TO E. SIMON'S RETURN TO RULE FOR CONTEMPT.
Filed Nov. 15, 1907.

STATE OF LOUISIANA FOR THE PARISH OF ORLEANS:

EPHRAIM SIMON
versus
SOUTHERN RAILWAY CO.

State of Louisiana to the Sheriff of the Parish of Orleans, Greeting:

We command you, That by seizure and sale of the property, real and personal rights and credits of defendant Southern Railway

Company in the manner prescribed by law, you cause to be made the sum of thirteen thousand three hundred and forty eight dollars with legal interest thereon from date of Judgment until paid and for all costs and also the sum of fifteen 70/100 Dollars costs as well as your own costs, and charges to satisfy a judgment rendered against the said defendant Southern Railway Company, in our Civil District Court for the Parish of Orleans 16th day of January, 1905, in favor of Plaintiff Ephraim Simon and how you shall have executed this writ, you make return to our said court (within seventy days) according to law.

Witness, the honorable T. C. W. Ellis, F. D. King, Geo. H. Theard, John St. Paul, W. B. Summerville, Judges of our said Court, this 8th day of November in the year of out Lord, 1907.

(Signed) W. E. FEENEY,
Deputy Clerk.

A true copy.
[SEAL.] (Signed) L. W. GUNTHER, *D'y Cl'k.*

155 No. 74869.

EPHRAIM SIMON
versus
SOUTHERN RAILWAY CO.

To the Honorable the Civil District Court for the Parish of Orleans, Div. "D":

The supplemental petition of Ephraim Simon respectifully represents;

That he has obtained from the Clerk of this Honorable Court a writ of *fieri facias* ordering the Sheriff of this Parish to seize and take into his possession the property real and personal rights and credits of defendant Southern Railway Company and to cause to be made, in the manner prescribed by law, an amount sufficient to pay and satisfy the same, viz: Thirteen thousand three hundred forty eight ($13348) Dollars with legal interest thereon from January 20, 1905 and costs of court and having good reasons to believe that the canal Louisiana Bank & Trust Co. and Harry Hall third persons are indebted to said defendant or have property or effects in their possession or under their control belonging to said defendant. Therefore, petitioner prays that said Canal Louisiana Bank & Trust Co., of New Orleans and Harry H. Hall of New Orleans be made garnishee herein, and ordered to answer under oath to accompanying interrogatories, and after all due and legal proceedings condemned to pay the amount of said Judgment interest and costs.

(Signed) LAZARUS, MICHEL & LAZARUS,
Attorneys for Petitioner.

Interrogatories to be Answered Categorically Under Oath, in Writing, Ten Days from Service.

1st. Had you in your hands or under control directly or indirectly at the time of service of these interrogatories, or at any time since any money, rights, credits, or other property whatsoever belong- or due to the said defendant in writ or in which it has or had any interest for the whole or for a part; and if yea what is the nature, description and amount thereof and is the same sufficient to pay or to satisfy the full amount of said Judgment, interest & costs or if less, to what amount. You being asked and required to make a full disclosure in relation to the same.

2nd. Interrogatory: Were you not, at the time of service upon you of these interrogatories or since directly or indirectly
156 indebted or obliged unto the said defendant in writ for anything or for any sum whatever, whether for yourself alone or together with others, in consequence of any sale or exchange or transaction of any kind whatever, whether the same be due or to become due, and whether the interest of said defendant in writ be direct or indirect, or be for the whole or a part only or whether it be by bill, note or otherwise; and if yea, what *if* the nature, description and amount thereof, and is the same sufficient to pay or satisfy the full amount of said Judgment, interest and costs, or if less, what amount?—you being asked and required to make a full and detailed disclosure in relation to the same.

3d. Interrogatory: Have you, at any time since the service of notice of seizure in your hands herein made, directly or indirectly, unto or with the said defendant in writ any payment or innovation or compromise, or arrangement or given it any note or written obligation, or received from it directly or indirectly any receipt or acquittance? and if yea, state the nature, description and amount thereof, and the time, place and circumstances of the same.

(Signed) LAZARUS, MICHEL & LAZARUS,
Att'ys for Pet'r.

A true copy.
[SEAL.] L. W. GUNTHER,
Dy. Clerk.

Nov. 7, 1907.

157 (On reverse side.)

Let this supplemental petition be filed, and let Mr. Harry H. Hall and the Canal Louisiana Bank and Trust Company, of New Orleans, La., be made garnishee herein, and ordered to answer the accompanying interrogatories, under oath; in writing, within ten days from service and as the law directs as herein prayed for.

New Orleans, Nov. 8, 1907.

(Signed) W. B. SOMMERVILLE, *Judge.*

No. 74869, Div. "D." Civil District Court,—Ephraim Simon *vs.* Southern Railway Co.,—Lazarus, Michel & Lazarus, Attorneys.—Filed Nov. 8th, 1907. (Signed) W. E. Feeney, Deputy Clerk.

158 STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

No. 74869.

EPHRAIM SIMON
versus
SOUTHERN RAILWAY CO.

To Harry H. Hall, Garnishee, New Orleans:

You are hereby cited, to declare on oath, what property belonging to the Defendant in this case you have in your possession or in what sum you are indebted to said Defendant, and also, to answer in writing under oath, the interrogatories, annexed to the supplemental petition of which a copy accompanies this citation and deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans, within ten days after the service hereof, otherwise judgment will be entered against you for the amount claimed by the plaintiff with interest and costs.

Witness the Honorable W. B. Sommerville, Judge of the said Court, the 8th day of November in the year of our Lord, 1907.

(Signed) W. E. FEENEY,
Deputy Clerk. [SEAL.]

A true copy.
[SEAL.] (Sig.) L. W. GUNTHER,
Dy. Clerk.

On reverse side.

I served a copy of the within Citation and accompanying supplemental petition and interrogatories on Harry H. Hall Garnishee herein in person.
Returned same day.
Sheriff's fees $1.50.
(Signed) C. M. GOSS,
Deputy Sheriff.

No. 74869, Civil District Court, for the Parish of Orleans,—Ephraim Simon *vs.* Southern Railway Co.—Lazarus, Michel & Lazarus, Attorney. Copy of Supplemental Petition, Interrogatories and Citation inside to be served on Garnishee, See inside.—Received Friday Nov. 8, 1907 and on the 8th day of November, 1907 at 2:30 P. M.—Filed Nov. 14, 1907 (Signed) L. W. Gunther, Dy. Clerk.

159 STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

No. 74869.

EPHRAIM SIMON
versus
SOUTHERN RAILWAY CO.

To the Canal Louisiana Bank and Trust Company through its proper officers, Garnishee, New Orleans:

You are hereby cited to declare on oath, what property belonging to the Defendant in this case you have in your possession, or in what sum you are indebted to said Defendant, and also to answer in writing under oath the interrogatories annexed to the supplemental Petition of which a copy accompanies this citation, and deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans, within ten days after service hereof, otherwise judgment will be entered against you for the amount claimed by the plaintiff with interest and costs.

Witness the Honorable W. B. Sommerville, Judge of the said Court, the 8th day of November in the year of our Lord, 1907.

(Signed) W. E. FEENEY,
Deputy Clerk. [SEAL.]

A true copy.
[SEAL.] (Signed) L. W. GUNTHER,
Dy. Clerk.

On reverse side.

Received Friday Nov. 8th, 1907, and on the 8th day of November 1907 at 2:10 P. M. I served a copy of the within Citation and accompanying supplemental petition and interrogatories on the Canal Louisiana Bank and Trust Company Garnishee herein by personal service on R. M. Walmsley, its President.

(Signed) C. M. GOSS,
Deputy Sheriff.

Returned same day.
Sheriff's fees $1.50.

No. 74869—Civil District Court, for the Parish of Orleans—Ephraim Simon *vs.* Southern Railway Co.—Lazarus, Michel & Lazarus, Attorneys. Copy of Supplemental Petition, Interrogatories and Citation inside to be served on Garnishee, See inside. Filed Nov. 14, '07. Signed L. W. Gunther, Dy. Clerk.

160 Civil District Court, Div. "D."

No. 74869.

EPHRAIM SIMON
vs.
SOUTHERN RAILWAY COMPANY.

Now into Court comes the Canal-Louisiana Bank & Trust Company of New Orleans, made garnishee herein, and to the interrogatories herein propounded to it, says and answers as follows:

To the first interrogatory, it answers: No.

To the second interrogatory, it answers: No.

To the Third interrogatory, it answers: No.

Wherefore your said garnishee and respondent prays to be hence dismissed with costs, and for all general and equitable relief.

CANAL-LOUISIANA BANK & TRUST COMPANY,
(Signed) By R. M. WALMSLEY, *President.*

(Signed) MILLER, DUFOUR & DUFOUR, *Attorneys.*

STATE OF LOUISIANA:
Parish of Orleans:

Robert M. Walmsley, being duly sworn, deposes and says:

That he is the President of the Canal Louisiana Bank & Trust Company of New Orleans, and that the foregoing answers are true and correct, so help him God.

(Signed) R. M. WALMSLEY.

Sworn to and subscribed before me this 9th day of November, 1907.

[SEAL.] (Signed) JOHN JANVIER,
Notary Public.

A true copy.

[SEAL.] (Signed) L. W. GUNTHER,
Deputy Clerk.

Endorsed: No. 74869 Civil Dist. Court Div. D—Ephraim Simon *vs.* Southern Railway Co.—Answer to interrogatories Canal-La. B. & T. Co.—Filed Nov. 11,/07. Signed L. W. Gunther. Dy. Clk. Miller, Dufour & Dufour.

161 Civil District Court, Division D.

No. 74869.

EPHRAIM SIMON
vs.
SOUTHERN RAILWAY COMPANY.

And now into Court comes Harry H. Hall upon whom notice of seizure, garnishment process and interrogatories herein were served on the 8th day of November 1907, and for answer thereto and to the said interrogatories says:

That he did not have at the time of said service, nor has he had since any property, movable or immovable of any kind whatsoever in his possession or under his control belonging to the defendant company nor is he in any manner indebted unto the said defendant and he further answers the said interrogatories categorically.

To Interrogatory No. 1, he says: No.
To interrogatory No. 2, he says: No.
To Interrogatory No. 3, he says: No.
To interrogatory No. 4, he says: No.

Harry H. Hall being duly sworn says that the foregoing answers are true.

(Signed) HARRY H. HALL.

Sworn to and subscribed to before me this 13th day of November 1907.

[SEAL.] (Signed) L. W. GUNTHER,
D'y Cl'k Civil Dist. Court.

A true copy.

[SEAL.] (Sig.) L. W. GUNTHER,
Deputy Clerk.

Endorsed: No. 74869, Civil District Court, Division D. Ephraim Simon *vs.* Southern Railway Co. Answer to garnishment, Filed Nov. 13/07 Signed L. W. Gunther, D'y Clerk. Hall & Monroe, Att'ys.

162 *Proceedings and Note of Evidence on Behalf of Complainant. Filed November* 15, 1907.

In the Circuit Court of the United States for the Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY CO.
vs.
EPHRIAM SIMON.

On the Motion Made by Complainant, Southern Railway Company to Punish Defendant for Contempt.

Proceedings and offerings had in the above numbered and entitled cause on the trial of the above motion before the Honorable Eugene D. Saunders, United States District Judge, on Friday, November 15th, 1907, on behalf of plaintiff.

Appearances.

Harry H. Hall, Esq., appearing for the Southern Railway Co., Henry L. Lazarus, Esq., and David Sessler, Esq., for Ephriam Simon, Respondent.

163 By Mr. HALL: On the motion to commit for contempt, Solicitors for the Southern Railway Company offer in evidence:

1. The original bill, demurrer, the plea, the answer herein, and further, the entire record, and the evidence therein.

And offer particularly, the restraining order herein rendered on November 6th, 1905, and signed by Judge Charles Parlange;

Also the preliminary injunction issued on the 9th of June 1906 under a judgment rendered on that day, and signed by Judge Parlange;

The bond for $2000 given in conformity with that judgment;

The reasons, and the opinion given by Judge Parlange, for issuing that injunction.

The writ of injunction or the mandate of injunction, bearing date June 30, 1905, together with the return by the United States Marshal showing service in person on Ephriam Simon on that day;

The *fi fa* docket of the Civil District Court showing—or rather that part of it showing the application made by counsel for Ephriam Simon for the issuance of writs of *fieri facias.*

The writ of *fieri facias;*

The notice of seizure served upon Harry H. Hall, together with garnishment process and interrogatories served on him and addressed to him and the Canal-Louisiana Bank & Trust Company,—all these proceedings being in suit No. 74869 of the docket of the Civil District Court for the Parish of Orleans in the case of Ephriam Simon *vs.* Southern Railway Company.

164 *Agreement.*

It is agreed by and between counsel for the respective parties herein that no appeal has been taken in this proceedings,—Southern Railway Company *vs.* Ephriam Simon, No. 13,300—either from the restraining order or the preliminary injunction, and that the matter now stands pending before this court on the final answer.

Whereupon mover rested.

165 *Proceedings and Note of Evidence on Behalf of Defendant. Filed Nov.* 15, 1907.

In the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRIAM SIMON.

On Motion for Contempt Taken by Southern Railway Co.

Proceedings and offerings had in the above numbered and entitled cause on the trial of the above motion before the Honorable Eugene D. Saunders, United States District Judge, Presiding, on Friday, November 15th, 1907, on behalf of defendant.

Appearances.

Harry H. Hall, Esq., appearing for the Southern Railway Co.; Henry L. Lazarus and David Sessler, Esq. for Ephriam Simon, Respondent.

166 Offerings by Judge LAZARUS: I offer, in connection with the evidence tendered by Solicitor for Southern Railway Company, and supplemental thereto, the exhibits referred to in the bill of complaint, and particularly the record of the Civil District Court for the Parish of Orleans, in the case entitled "Ephriam Simon *vs.* Southern Railway Company, No. 74869," of said court.

And I offer particularly and especially in evidence, the order signed by Honorable W. B. Sommerville, Judge of the Civil District Court for the Parish of Orleans, upon the supplemental petition of Ephriam Simon, ordering garnishment process herein, all in accordance with the statute laws of Louisiana.

Admission.

It is admitted that W. B. Sommerville, is one of the Judges of the Civil District Court for the Parish of Orleans, State of Louisiana, and that he was a judge of the Civil District Court at the time of the

proceedings No. 74869 of the docket of said court, and that he presided, as judge of said court, in the conduct of said proceedings, and that he signed the judgment rendered in said cause.

Whereupon the defendant rested.

167 *Reasons for Judgment on Motion of Complainant to Have Defendant Punished for Contempt. Filed November 15th, 1907.*

In the Circuit Court of the United States for the Eastern District of Louisiana.

No. 13300.

SOUTHERN RAILWAY COMPANY
vs.
EPHRIAM SIMON.

On Motion of Southern Railway Co. to Punish Defendant for Contempt.

SAUNDERS, *J.* (orally):

The defendant in the present case, Ephriam Simon, obtained a judgment in the Civil District Court for the Parish of Orleans against the plaintiff in this case, the Southern Railway Company. After that judgment had become final in the Civil District Court, the Southern Railway Company instituted the present suit in this court to annul the judgment of the Civil District Court for the Parish of Orleans against it and in favor of said Simon. The ground on which the nullity herein is demanded is that the Southern Railway Company was not cited to appear and did not appear in the proceedings in the Civil District Court, and it is claimed that, for that reason, the judgment of the Civil District Court should be annulled.

Under the sections of the Code of Practice of Louisiana which treat of the nullity of judgments, namely Sections 604, 613, it is provided that,

"The defendant against whom a judgment has been rendered, may institute proceedings to have that judgment annulled
168 wherever the defendant was not cited and did not appear." (See Art. 605.)

The proceedings to annul a judgment, is a distinct and separate suit from the proceeding in which the judgment itself is rendered. It does not, in any way, grow out of the proceeding in which the judgment was rendered, but is an independent proceeding whereby the result of the original suit is attacked. It is true that in the State courts the suit to annul must be filed in the same court and in the same proceeding in which the judgment attacked, was rendered. This is a mere matter of distributing jurisdiction in a State court.

Essentially, the proceeding to attack and avoid the judgment, is an independent suit. Where the requisite diversity of citizenship exists, this suit may be brought in the Federal court as well as in the State court.

It is apparent to me, therefore, that this court had jurisdiction to entertain the demand of the plaintiff herein to annul the judgment of the state court in favor of the defendant herein. In the exercise of that jurisdiction, this court, in June, 1905, rendered an order authorizing the issuance of a preliminary injunction restraining the defendant (Simon) from executing the judgment he had obtained in the Civil District Court for the Parish of Orleans. Pending the trial of this case, Simon took no appeal from that order which is now final and unappealable as an interlocutory order in this case.

In this situation I can see no reason or justification on the part of the defendant, Simon, for disregarding the injunction, and I, therefore, hold that he is in contempt of this court in disregarding the injunction and in attempting to enforce the judgment of the Civil District Court for the Parish of Orleans which he has been enjoined by this court from attempting to enforce, and the only thing that remains for me to do is to enforce jurisdiction of this court by punishing defendant Simon for contempt.

Counsel for defendant, however, insists that the proceed-
169 ings taken by him, is a proper way for carrying this matter before the Supreme Court, for the determination by that tribunal of the jurisdiction of this court to issue the injunction. I have no doubt that this statement is made in entire good faith, and I shall, therefore, consider that fact in the sentence that I am about to impose.

The rule will be made absolute, and it is ordered that the defendant at once release the seizure and desist from the proceedings which he has taken in the Civil District Court for the Parish of Orleans to enforce the judgment originally obtained by him in that court, and from the enforcement of which he was enjoined in this court in this proceeding, and that if this is not done completely and entirely by Thursday, the 21st day of November, next, at eleven o'clock A. M., then the defendant shall pay a fine of One hundred dollars and shall stand committed in the Parish Prison for ten days for contempt, of this court; and the defendant shall, in the meantime, stand committed in the custody of the marshal of this court.

Counsel for defendant, since the foregoing was dictated, have called my attention to the case of *Ex Parte* Davis, 112 Fed. Rep. p 139, in which the Circuit Court of Appeals of this Circuit, have held that courts have the power to fine or imprison for contempt, but cannot do both.

With my attention attracted now to that decision, the foregoing order is changed so as to read:

The defendant Ephriam Simon is hereby fined the sum of One hundred dollars for contempt of this court, and that he stand forthwith committed to be imprisoned in the Parish Prison for the Parish

of Orleans until said fine is paid, and accordingly, the mar-
170 shal of this court is ordered at once to take the said defend-
ant, Ephriam Simon, in custody until the fine hereby im-
posed is said.

(Signed) E. D. SAUNDERS, *Judge.*

Nov. 15, 1907.

171 *Hearing and Judgment upon Motion of Complainant to Have Defendant Punished for Contempt.*

Extract from the Minutes of November 15th, 1907.

No. 13300.

U. S. Circuit Court, Eastern District of Louisiana.

THE SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

This cause came on this day to be heard upon the Motion of the Complainant filed herein on November 11th, 1907, to have the defendant Ephraim Simon, committed and punished for contempt of this Court for the reasons set forth in said Motion.

Present: Harry H. Hall, Esq., Solicitor for the Complainant, H. L. Lazarus and David Sessler, Esqs., Solicitors for the defendant, and the defendant Ephraim Simon in person.

Counsel for Complainant then read to the Court the Motion, and the Counsel for the defendant read his Answer to the same; thereupon Counsel for the respective parties offered evidence and the matter was argued.

Whereupon and upon consideration thereof, it is now ordered, for the written reasons on file, that the defendant, Ephraim Simon, is hereby fined the sum of One Hundred Dollars for contempt of this Court and that he stand forthwith committed to be imprisoned in the Parish Prison for the Parish of Orleans until said fine is paid, and accordingly, the Marshal of this Court is ordered at once to take the said defendant, Ephraim Simon, in custody until the fine hereby imposed is paid.

November 15th, 1907.

172 *Marshal's Return. Filed November* 16, 1907.

In the Circuit Court of the United States for the Eastern Dist. of New Orleans.

No. 13300.

THE SOUTHERN RAILWAY COMPANY
vs.
EPHRAIM SIMON.

I certify that the defendant, Ephraim Simon is, at the time of signing hereof in my custody for being in contempt of Court, and under order of the Judge of said Court is to remain in my custody until the fine imposed is paid.

(Signed) VICTOR LOISEL,
U. S. Marshal,
By T. I. GALBRETH,
Deputy U. S. Marshal.

New Orleans, Louisiana, November 15th, 1907.

173 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE:

I, Henry J. Carter, Clerk of the Circuit Court of the United States, for the Fifth Circuit and Eastern District of Louisiana, do hereby certify, that the foregoing 172 pages contain and form a full complete, true and perfect transcript of the Record and Proceedings had, together with all the evidence adduced on the trial of the case of Southern Railway Company versus Ephraim Simon, No. 13300 of the Docket of the said Court.

Witness my hand and the seal of said Court, at the City of New Orleans, this 15 day of November, A. D. 1907.

[SEAL.] H. J. CARTER, *Clerk.*

I, Eugene D. Saunders, United States Judge for the Eastern District of Louisiana, do certify, that Henry J. Carter, whose name is signed to the above certificate as Clerk of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, was, at the time of signing said certificate, and is now the Clerk of said Court: That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such Clerk.

Given under my hand, at the City of New Orleans, in said district this 15th day of November, A. D. 1907.

EUGENE D. SAUNDERS, *Judge.*

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. ———— Original.

Ex Parte:
In the Matter of Ephraim Simon, Petitioner.

Petition for Writs of Habeas Corpus and Certiorari, and Motion for Leave to File Same.

PETITIONER'S BRIEF.

The petitioner, a citizen of Louisiana, now in the custody of the United States Marshal at New Orleans under an order of the Circuit Court of the United States for the Eastern District of Louisiana, moves for permission to file his petition in this court, for relief by *habeas corpus* from further detention and restraint, on the ground that the order of commitment was entered by a court without jurisdiction, and in direct violation of Section 720 of the Revised Statutes of the United States.

On December 1, 1904, Ephraim Simon, the petitioner, filed in the Civil District Court for the Parish of Orleans, in the State of Louisiana, a duly constituted court of that state, a petition in an action brought by him against the Southern Railway Company, for the recovery of damages sustained by him while a passenger on one of the trains of that company, resulting from a collision due to the gross and criminal negligence of that corporation. The amount of damages claimed was Thirteen thousand three hundred and forty-eight Dollars ($13,348), and the petition, with unusual particularity, indicated the nature of the injuries sustained and the resultant pecuniary damages for which recovery was sought (Record, pp. 6-10). The prayer for relief is as follows (Rec., p. 10):

"Wherefore, the premises considered, your petitioner prays that the Southern Railway Company, defendant herein, be cited to appear in answer hereto, and that, it having failed to comply with the provisions of Section One of Act No. 54 of the Session of 1904, the service of process in this suit be made upon Hon. John T. Michel, Secretary of State, said service, so made, to be a service upon the said Southern Railway Company, as provided for in the act aforesaid, and that, after the legal delays and due proceedings had, there be judgment in favor of your petitioner and against the said Southern Railway Company in the full sum of Thirteen thousand three hundred forty-eight ($13,348.00) Dollars with legal interest thereon from judicial demand until paid.

"Petitioner prays for trial by jury, and for costs and for general relief."

Thereupon, on December 2, 1904, a citation was issued to the defendant, through the Secretary of

State, to comply with the demand contained in the petition, a copy of which accompanied the citation, or to deliver its answer to the same in the office of the clerk of the Civil District Court for the Parish of Orleans, within ten days after service. The citation and petition were served by the Sheriff on the Southern Railway Company, by personal service on the Secretary of State on December 3, 1904 (Rec., p. 11).

On January 10, 1905, the defendant having failed to answer, judgment by default was ordered by the court against the defendant. A jury was impaneled, and witnesses sworn. The court charged the jury, which found a verdict in favor of the plaintiff for the sum of Thirteen thousand three hundred and forty-eight Dollars ($13,348), the amount demanded in the petition, with interest and costs. The court thereupon rendered judgment in open court, on January 16, 1905, which judgment was read and signed in open court, on January 20, 1905, the judgment, after reciting the matters already referred to, providing:

"On motion of counsel said verdict was ordered recorded and judgment entered in accordance therewith. Considering the verdict of the jury in this matter, *and that the demand of plaintiff was proved,* and the law and the evidence being in favor of said plaintiff,

"It is ordered, adjudged and decreed that the default herein entered on January 10, 1905, be now confirmed and made final and accordingly that there be judgment in favor of the plaintiff Ephraim Simon and against the defendant Southern Railway Co., in the full sum of Thirteen thousand three hundred and forty-eight ($13,348.00) Dollars, with legal interest thereon from date of judgment until paid and for costs" (Rec., pp. 12, 13).

Article 264 of the Louisiana Constitution of 1898, provides:

"Art. 264. No domestic or foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the state upon whom process may be served."

Act No. 54 of the Louisiana General Assembly of 1904, is as follows:

"AN ACT

To carry into effect Article 264 of the Constitution of 1898, in respect to foreign corporations doing business in this State.

SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That it shall be the duty of every foreign corporation doing any business in this State to file in the office of the Secretary of State a writen declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business, and the name of its agent or agents or other officer in this State upon whom process may be served.

SEC. 2. Be it further enacted, etc., That whenever any such corporation shall do any business of any nature whatever in this State without having complied with the requirements of Section 1 (one) of this act, it may be sued for any legal cause of action in any parish of the State where it may do business, and service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served.

SEC. 3. Be it further enacted, That all laws and parts of laws in conflict or inconsistent with this act be and the same are hereby repealed."

All of the proceedings in the action instituted by the Petitioner, were in the usual course of legal procedure and were set forth in the newspaper reports of the court proceedings, and Judge Sommerville, before whom all the proceedings took place in regular course, so indicates in his deposition (Rec., p. 19), which contains the following:

"Before signature of the judgment became due, Mr. Harry H. Hall was aware of the judgment and spoke to me on the subject. No application was made to me for a new trial, and the judgment was signed January 20, 1905. No application was made to me by the defendant in the case referred to for any relief from the judgment therein."

Mr. Harry H. Hall, referred to in this deposition, acted as counsel and in other capacities for the Southern Railway Company at New Orleans, and admits that on or about January 17, 1905, he saw in one of the daily newspapers of New Orleans, or in the Court Bulletin, notice of the rendition of the verdict against the Southern Railway Company in the case brought against it by the petitioner, and that on the morning of that day he examined the minutes of the Civil District Court of Division D, presided over by Judge Walter D. Sommerville, for the purpose of verifying the publication, and that Judge Sommerville called Mr. Hall to him, and inquired if he represented as defendant's counsel in New Orleans, the Southern Railway Company, to which inquiry he replied that he did not represent the company as its counsel, and that the Railway Company was not represented in the city by any counsel or by any agent (Rec., p. 51).

On February 6, 1905, the Southern Railway Company filed a bill of complaint in the United

States Circuit Court, Eastern District of Louisiana, in a suit against the Petitioner, Ephraim Simon, in which it seeks relief as follows (Rec., p. 4):

"In consideration whereof and for as much as your Orator is remediless in the premises and by the strict rules of the common law, and is only relievable in a court of equity where matters of this kind are cognizable, and relievable, your Orator therefore prays that the said Ephraim Simon, who is the plaintiff as aforesaid in said action at law, entitled Ephraim Simon *vs.* the Southern Railway Company, No. 74869 Civil District Court for the Parish of Orleans, his counselors, attorneys, solicitors or agents *may be restrained by an injunction issuing out of this court from further proceeding against your Orator, under the said suit and judgment, or from issuing execution thereon, or attempting thereunder to seize any property movable or immovable of your Orator, or in any manner attempting to enforce the same.*"

The allegations of this bill are most extraordinary. After alleging the diversity of citizenship of the parties, it is admitted that the Petitioner was, on February 8, 1904, while a passenger on one of the complainant's trains, injured by a collision. It is stated that by such collision both of the ankles of the Petitioner were slightly sprained, he sustaining no other or further injury, and that notwithstanding the insignificance of the sprains, he presented to the complainant an exaggerated and untrue statement of his injuries, falsely claiming that he had been damaged by reason of the collision, in the sum of Five thousand Dollars; that the complainant had the injuries examined by a surgeon, who pronounced them

slight, and offered Three hundred and fifty Dollars in full compensation, which he refused to accept, but considered and discussed the acceptance of Seven hundred and fifty Dollars, which was not agreed to, and the matter was then temporarily left in abeyance with a view of having the Petitioner modify his demand; that the Petitioner, instead of terminating the discussion and attempted adjustment by refusal, surreptitiously and without the complainant's knowledge, entered against it in the Civil District Court for the Parish of Orleans, a suit for damages, in which he falsely and fraudulently pretended that he had been injured to the extent of Thirteen thousand three hundred and forty-eight Dollars; that the citation issued in this suit was served on the Assistant Secretary of State of Louisiana on December 3, 1904; that the complainant was not a foreign corporation doing business in the State of Louisiana, and that none of its lines of railway entered or traversed any part of the State; that the attempted service of the citation was absolutely null and void for the purpose of bringing the complainant under the jurisdiction of said Civil District Court; that the petitioner caused a default to be entered in the action brought by him, a jury to be impanelled, and fraudulently caused to be entered by the jury a verdict of Thirteen thousand three hundred and forty-eight Dollars, which verdict was subsequently embodied in a judgment of the Civil District Court; that in confirming the default taken in the action the petitioner was guilty of subterfuge and fraud in claiming and adducing testimony to the effect that he had sustained damages in the sum of Thirteen thousand three hundred and forty-eight Dollars, "he knowing full well that his claim, as originating with himself

and before discussion or suggestion of compromise was for Five thousand Dollars, the total damage, which he pretended to have sustained or suffered by reason of said collision, and he having been apparently willing to accept, after discussion, one-half of that sum"; that the claim for loss of profit, deterioration of stock, extra cost of manufacturing stock, constituting a part of Petitioner's claim for damage, were claims that he well knew were "fraudulent, fictitious and utterly untrue, and even if true, would be such remote and consequential damages as could not be recovered"; that the complainant never received from the Secretary of State the citation issued out of the Civil District Court; nor did it have any knowledge of the pendency of the proceedings until after the rendition of judgment; "that the verdict of the jury and the judgment of the Civil District Court were unconscionable as having been rendered fraudulently and upon false testimony, and without due and proper citation or notice to your Orator; and that it would be against good conscience to allow said judgment to be used to extort money that is not owing from your Orator, which has no remedy at law in the premises, and has a complete and meritorious defence to the claim on which said judgment is based."

It is further alleged:

"11. And your Orator avers that it was prevented from availing itself of its defense to the cause of action embodied in said proceedings by the accident or failure of its not receiving from said Secretary of State any citation or notice of said proceeding, and that it has been without negligence either of itself or its agents in the premises. Your Orator avers that this Court has plenary jurisdiction *to restrain the enforcement of such*

judgment, to which your orator has a meritorious defence, which it was prevented by fraud and accident, unmixed with its own negligence from adducing.

"12. Your Orator avers that unless prevented and restrained, the said Ephraim Simon will attempt to collect said fraudulent judgment and will cause to be issued thereon, out of the Civil District Court, a writ of *fieri facias*, under and by virtue of which he will attempt to seize your Orator's property and thereby cause it continuous and irreparable injury.

"And your Orator avers that it is informed and verily believes that such action is about to be taken by the said Ephraim Simon, and that it is entitled to a writ of injunction and restraining order to prevent such action.

"Your Orator annexes and makes part of this bill a copy of the said record in the State Court and a letter from the Secretary of State marked Exhibit 'A' and Exhibit 'B' " (Rec., p. 4).

In the letter from the Secretary of State referred to, he states:

"that acting under the instructions of the Attorney General we simply filed the copy of citation and petition made on us in the case of 'Ephraim Simon *versus* The Southern Railway Company, No. 74869 Civil District Court Parish of Orleans,' the said Company having failed to designate an agent upon whom service of process can be made as required by law" (Rec., p. 14).

On this showing, Judge Parlange issued a restraining order on February 6, 1905, enjoining the Petitioner to absolutely refrain and desist from further proceeding against the complainant under the said judgment in the action entitled Ephraim Simon *v.* The Southern Railway Com-

pany, No. 76869 Civil District Court for the Parish of Orleans, or from issuing execution thereon, or attempting thereunder to seize any property, movable or immovable, of the complainant, or in any manner attempting to enforce the same (Rec., p. 14).

On a subsequent hearing, at which all of the allegations of fraud were specifically denied, and no proof was given indicating to the slightest extent that there had been any fraud or wrongful action on the part of the Petitioner, and on which the affidavits presented by the complainant were in absolute refutation of the material allegations of the complaint (Rec., pp. 45-49), a preliminary injunction was issued as prayed for in the bill of complaint (Rec., pp. 70, 71).

On November 8, 1907, pursuant to an authorization from the Civil District Court for the Parish of Orleans, the Petitioner caused writs of *fieri facias* and garnishment to be issued against the Southern Railway Company, under which the Sheriff undertook to seize property of the company (Rec., pp. 86-88). Proceedings to punish the Petitioner for contempt followed, and came on for hearing before Honorable Eugene D. Saunders, United States District Judge, on November 15, 1907. The Petitioner, while disclaiming any intention to treat the court or its orders with disrespect, insisted that the court was without power or jurisdiction to issue a writ of injunction to stay proceedings in the State Court, and being without power or jurisdiction to issue the writ, its breach cannot be construed as a contempt of court (Rec., pp. 89, 90). This contention was, however, overruled, and judgment was rendered, that the Petitioner "is hereby fined the sum of One hundred

dollars for contempt of this court, and that he stand forthwith committed to be imprisoned in the Parish Prison for the Parish of Orleans until said fine is paid, and accordingly, the marshal of this court is ordered at once to take the said defendant Ephraim Simon, in custody until the fine hereby imposed is paid."

Pursuant to this judgment, the Petitioner is now in the actual custody of the United States Marshal at New Orleans (Rec., p. 103).

POINTS.

I.

The petitioner being restrained of his liberty by a United States Marshal, under a judgment of the United States Circuit Court, which is claimed to be void, habeas corpus is the proper remedy to test the validity of the imprisonment.

The rule on this subject is stated with great clearness by Mr. Justice Miller in *Ex Parte Fisk, 113 U. S., 713-618*:

"When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court has no authority to make, the order itself, being without jurisdiction, is void and the order punishing for contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in

such a case results in imprisonment, this court will by its writ of *habeas corpus,* discharge the prisoner. It follows necessarily that on a suggestion by the prisoner, that, for the reason mentioned, the order under which he is held is void, this court will, in the language of the statute, make 'inquiry into the cause of the restraint of liberty' (Sec 752, Rev. Stat.)."

Ex parte Kearney, 7 Wheat., 38;
Ex parte Wells, 18 How., 307;
Ex parte Lange, 18 Wall., 163;
Ex parte Parks, 93 U. S., 18;
Ex parte Siebold, 100 U. S., 371;
Ex parte Rowland, 104 U. S., 604;
Ex parte Bain, 121 U. S., 1;
In re Ayers, 123 U. S., 443.

II.

The preliminary injunction issued out of the United States Circuit Court, which restrained the proceedings of the petitioner in the Civil District Court of Louisiana, being in contravention of Section 720 of the United States Revised Statutes, was a nullity, and its disregard by the petitioner does not constitute contempt.

Section 720 of the United States Revised Statutes, which had its genesis in Section 5 of the Act of March 2, 1793, Ch. 22, 1 Statutes at Large, 334, reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This section applies to the Supreme Court as well as to the Circuit Courts.

Slaughter House Cases, 10 Wall., 273.

Its prohibition extends not only to the proceedings in a State Court up to and including the final judgment, but to the entire proceedings from the commencement of the suit until the execution issued on the judgment or decree is satisfied.

Wayman v. *Southard, 10 Wheat, 1;*
Leathe v. *Thomas, 97 Fed. Rep., 126;*
Fenwick Hall Co. v. *Old Saybrook, 66 Fed. Rep., 389;*
Haines v. *Carpenter, 91 U. S., 254;*
Dial v. *Reynolds, 96 U. S., 340;*
Sargent v. *Helton, 115 U. S., 348.*

The apparent oversight of the authorities by the court below, and its misinterpretation of 5720 justifies the following excerpts from the opinions of this Court.

In *Haines* v. *Carpenter, supra,* Mr. Justice Bradley said:

"A mere statement of the bill is sufficient to show that it cannot be sustained. Whilst it undoubtedly presents some matters of equitable consideration, they are so mixed up with others

of a different character, or which cannot be entertained by the Circuit Court of the United States, and which constitute the main object and purpose of the suit, as to make the bill essentially bad on demurrer. In the first place, the great object of the suit is to enjoin and stop litigation in the State courts, and to bring all the litigated questions before the Circuit Court. This is one of the things which the Federal Courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in section 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the Bankrupt Law. This objection alone is sufficient ground for sustaining the demurrer to the bill."

In *Dial* v. *Reynolds, supra,* Mr. Justice Swayne said:

"There are two objections to these bills: 1. The gravamen of what is desired as to Reynolds is an injunction to prevent his proceeding at law in the State court. Without this, all else is of no account. Any other remedy would be unavailing. Such an injunction, except under the Bankrupt Act, no court of the United States can grant. With this exception it is expressly forbidden by law."

In *Sargent* v. *Helton, supra,* Mr. Justice Woods, after citing this provision, said:

"The sole purpose of the bill in this case was to restrain the execution of an order of the Circuit Court for the county of Escambia, a court of the State of Alabama, and no relief, which, upon the averments of the bill, this court could grant would be effectual without the writ of injunction prayed for. The Circuit Court of the United States was, therefore, deprived of power, by the

section just quoted, to protect the rights of the plaintiff, unless the writ of injunction was authorized by the law relating to the proceedings in bankruptcy, *Haines* v. *Carpenter, 91 U. S., 254; Dial* v. *Reynolds, 96 U. S., 340.* In a timely suit brought by the assignee in bankruptcy, there is no doubt that, upon a proper showing, the Circuit Court might have enjoined proceedings in the attachment suits in the State court. This is the express ruling in *Chapman v. Brewer, 114 U. S., 158.* But the plaintiff in this case is not the assignee in bankruptcy. Sullivan, the transferee of Sargent, the vendee at the bankruptcy sale, was the real plaintiff and the only party who, at the final hearing, asked for the injunction. The question, therefore, is, does any law relating to proceedings in bankruptcy authorize an injunction at the instance of a purchaser of property at a bankruptcy sale, or his vendee, to stay proceedings in a State court?

"There is no act of Congress expressly authorizing a Circuit Court of the United States to restrain by injunction, even at the suit of an assignee in bankruptcy, proceedings in a State court. The case of *Chapman v. Brewer, ubi supra,* was a bill in equity filed by an assignee in bankruptcy to enjoin the defendant from selling the property of the bankrupt upon execution issued out of the State court. The jurisdiction to issue the writ in that case was placed upon § 5024 Rev. Stat., which authorized the District Court, sitting in bankruptcy, when a petition in involuntary bankruptcy had been filed, to restrain by injunction all persons from interfering with the debtor's property; and upon § 4979, which gives the Circuit Court concurrent jurisdiction with the District Courts of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest in any property transferable to or vested in him. * * * The case makes it clear that the injunction to stay proceedings in a State court is only allowed by the statute for the purpose of aiding the assignee in bankruptcy to dis-

charge his duty and of protecting the property of the bankrupt estate for the equitable distribution among the creditors. But there is no act of Congress from which can be inferred authority to a court of the United States to issue an injunction to restrain proceedings of a State court, at the instance of a purchaser at bankruptcy sale, or of the vendee."

In *Moran v. Sturges, 154 U. S., 267,* Chief Justice Fuller said of the same provision:

"The general rule is that State courts cannot enjoin proceedings in the courts of the United States, and this wa sheld at a very early day, in reference to a judgment of the Circuit Court; *M'Kim v. Voorhies, 7 Cranch, 279, 281;* while on the other hand, it was determined that the Circuit Court would not enjoin proceedings in a State court, and any attempt of that kind was forbidden by act of Congress. *Diggs v. Wolcott, 4 Cranch, 179; Act of March 2, 1793, c. 22, § 5, 1 Stat. 333, 335.* In *Riggs v. Johnson County, 6 Wall., 166, 195,* this court, speaking through Mr. Justice Clifford, said: 'State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit Courts and State courts are separably and independently of each other, and in their respective spheres of action, the process issued by the one is as far beyond the reach of the other, as if the line of division between them was traced by landmarks and monuments visible to the eye,' * * *

Mr. Justice Story was of opinion that to the doctrine which permits the courts of one State in proper cases to enjoin persons within their jurisdiction from instituting legal proceedings in other States, or from further proceeding in actions already begun, there exists the exception that the State courts cannot enjoin parties from proceeding in the courts of the United States, *nor the latter enjoin them from proceeding in the former*

courts, an exception based upon peculiar grounds of municipal and constitutional law. Story Eq., § 900; Story Const., § 1757.

"By the Judiciary Act of March 2, 1793, c. 22, § 5, 1 Stat., 334, the granting of injunction to stay proceedings in any court of a State was prohibited in express terms, and it was held in *Peck v. Jenness, 7 How., 612, 624,* that even the District Court sitting in bankruptcy could not issue an injunction to stay a creditor of the bankrupt from proceeding in a State court [*before the amendment of the section by U. S. R. S.*], Mr. Justice Grier saying: 'It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause,—and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away, by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy v. The Earl of Cassilis, 2 Swanston, 313,* Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. *The fact, therefore, that an*

injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.'

"The provision of the act of 1793 was carried forward into section 720 of the Revised Statutes, with the addition of the words 'except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy,' and under that exception restraint by injunction was held authorized in Chapman *v.* Brewer, 114 U. S., 158. * * *

"A resort to injunction in proceedings in admiralty for the limitation of the liability of ship owners under an act of Congress, passed since the act of 1793, and expressly provided that after the institution of such proceedings 'all claims and proceedings against the owner shall cease;' Act of March 3, 1851, c. 43, § 4; 9 Stat., 635; Rev. Stat., § 4825; was sustained in *Providence & New York Steamship Co. v. Hill Manufacturing Co., 109 U. S., 578, 599, 600.*

"These were all cases in which the issue of an injunction to a State court had been expressly or impliedly authorized by Congress as necessary to the effectual exercise by a Court of the United States of its lawful jurisdiction over particular persons or things."

To these cases may be added an additional class, those cases where a Federal Court and a State Court have concurrent jurisdiction, in which it is held that the tribunal whose jurisdiction first attaches, holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved exhausted, in which case a Federal Court, if it has first acquired jurisdiction, may protect it by injunction.

Julian v. *Central Trust Company, 193 U. S., 93.*

Sharon v. *Terry, 36 Fed. Rep., 365.*
Moran v. *Sturges, 154 U. S., 256.*
In Re Chetwood, 165 U. S., 443.

That the rule of the statute applies not only to proceedings before judgment, but also to proceedings after judgment, is apparent from the language of Mr. Justice Shiras in *Central National Bank* v. *Stevens, 169 U. S., 464*:

"But it has been frequently determined by this court that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied. Thus it was said in *Riggs* v. *Johnson County, 6 Wall., 166*, that 'process subsequent to judgment, is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.' And in *Amy* v. *Supervisors, 11 Wall., 136*, it was said: 'The two sets of tribunals—state and national—are as independent as they are separate. Neither one can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgment and decrees.' 'An execution is the end of the law. It gives the successful party the fruits of his judgment.' *United States* v. *Nourse, 9 Pet., 8, 28.* But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction. '*Juris effectus in executione consistit.*' *Co. Litt., 289.*"

See also *U. S. v. Parkhurst-Davis Mercantile Co., 176 U. S., 317, 320.*

Here, the Civil District Court of Louisiana, acting in accordance with the statutes of that State, undertook to adjudicate with respect to the Petitioner's admitted cause of action against the Southern Railway Company, and to award to him

a judgment for the damages to which he was entitled. After that court had proceeded to judgment in conformity with its practice, the Southern Railway Company, feeling aggrieved by the judgment rendered, instead of appealing therefrom or seeking to set it aside in the tribunal which had assumed jurisdiction, or of proceeding by an independent suit to procure a decree of nullity in the State court, invoked the jurisdiction of the Federal Court, for the sole and boldly avowed purpose of procuring an injunction to stay the Petitioner's proceeding in the State court, and from attempting to enforce the judgment which that court had rendered in his favor.

No other prayer for relief is contained in the bill. No other theory for equitable intervention is presented. The hands of the State court are sought to be bound; its power to act, to be subjected to the paralyzing agency of an injunction issued out of another tribunal, and the suitor who has resorted to it for relief, is incarcerated, because he has ventured to appeal to the State tribunal, which, acting within its powers, and in an orderly and constitutional manner, had undertaken to afford to him the protection of the law.

The pretext by which the Federal Court has been asked to supersede the State Court is, that the Petitioner resorted to the courts of his own State, fraudulently claiming an excessive amount of compensation for injuries concededly inflicted by the negligence of the Southern Railway Company, and adducing testimony for the purpose of establishing claims for damages which were fraudulent, fictitious and untrue, or, if true, of so remote and consequential a character as not to be recoverable, and that the complainant was prevented from availing itself of a meritorious de-

fence (the nature of which is not stated), by the accident or failure of its not receiving from the Secretary of State of Louisiana, any citation or notice of the proceeding which had been instituted by the Petitioner.

These allegations, which are not supported by a single statement of fact, do not operate as a repeal of Section 720 of the United States Revised Statutes.

(*a*) *As to the Allegations of Fraud.*

The allegations are mere conclusions, a collection of epithets, and a series of *non sequiturs.*

Kent v. *Lake Superior Ship Canal Company, 144 U. S., 75, 91.*

A bill in chancery to set aside a judgment or decree of a court of competent jurisdiction on the ground of fraud, must state distinctly the particulars of the fraud, the names of the parties who were engaged in it, and the manner in which the court or the party was misled or imposed upon.

United States v. *Atherton, 102 U. S., 372.*
9 Encyclopedia Pl. & Pr., p. 684.
Brooks v. *O'Hara, 8 Fed. Rep., 532.*

A court of equity does not interfere with judgments at law, unless the complainant has an equitable defence of which he could not avail himself at law, or had a good defence at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence on his part or that of his agents.

Knox County v. *Harshman, 133 U. S., 154.*
White v. *Crow, 110 U. S., 184.*
1 Black on Judgments, § 393.

In a bill to set aside a judgment for fraud, it is not sufficient to charge generally that the judgment was procured fraudulently, or that the court was imposed upon, but a state of facts must be disclosed from which the court can see that the conclusions stated by the pleader are properly and fairly drawn.

Travelers Association v. *Gilbert, 111 Fed. Rep., 269.*
16 Am. & Eng. Ency. L., 2nd Ed., 374.

The *gravamen* of the bill, here, is, that because the Petitioner was willing to compromise at Five thousand dollars, therefore the presentation of a larger amount through the regular legal channels, constituted fraud.

Neither this fact, nor the suggestion that the Petitioner's testimony was fraudulent or fictitious, is a sufficient ground for an independent suit in equity to set aside the judgment of the State court.

United States v. *Throckmorton, 98 U. S., 65, 69.*
Steele v. *Smelting Co., 106 U. S., 454.*
Kimberly v. *Arms, 40 Fed. Rep., 558.*
Kiko v. *Cohn, 91 Cal., 134.*
Andes v. *Millard, 70 Fed. Rep., 517.*
Mayor of New York v. *Brady, 115 N. Y., 615.*

Moreover the Civil District Court, after a thorough consideration of the evidence, and a consideration of the witnesses expressly adjudged "that the demand of plaintiff [the petitioner] was proved (Rec., p. 13).

(b) As to the allegations of accident, based on the failure of the Railway Company to receive the citation from the Secretary of State.

The Constitution and laws of Louisiana, require corporations doing business within the State, to designate an agent upon whom process intended for the corporation may be served, and in default of such designation, permit such process to be served on the Secretary of State.

The statute does not require the Secretary of State to hunt up the corporation, but it presumes that the corporation, when it undertakes to transact business within the State of Louisiana, consents that the Secretary of State shall be permitted to receive process intended for it, and that it will take the necessary steps to procure from the Secretary of State such process. There is no pretence that the Secretary of State did not perform his full duty; and it is to be presumed that he acted in good faith and in strict accordance with his duty.

In *Lafayette Insurance Company* v. *French, 18 How., 404,* a corporation chartered by the State of Indiana, was allowed by a law of Ohio to transact business in the latter State, on condition that service of process upon its agent should be considered as service upon the corporation itself. It was held that a judgment against the corporation, obtained by means of such process, was entitled to receive the same faith and credit in Indiana, to

which it was entitled in Ohio; that the latter State had the right to impose such a condition upon all corporations transacting business within its boundaries, and that when a corporation undertook to carry on business in that State, it was presumed that it had assented to the condition.

This principle has been applied in numerous cases, especially in

New York, &c., Ry. Co. v. *Estill, 147 U. S., 608.*
Connecticut Mutual Life Ins. Co. v. *Spratley, 172 U. S., 613, and*
Mutual Reserve Assn. v. Phelps, 190 U. S., 147.
Pringle v. *Woolworth, 90 N. Y., 509.*

The *Phelps case*, is directly in point.

In the case last cited, a judgment was held valid where a summons intended for a New York corporation was served upon the Insurance Commission of Pennsylvania, in accordance with a provision of the State law similar to that contained in the Louisiana statute, under which process intended for the Southern Railway Company was served on the Secretary of State.

In *Wilson* v. *Seligman, 144 U. S., 45*, the rule was stated as follows:

"It may be admitted that any State may by its laws require, as a condition precedent to the right of a corporation to be organized, or to transact business, within its territory, that it shall appoint an agent there on whom process may be served; or even that every stockholder in the corporation shall appoint an agent upon whom, or designate a domicile at which, service may be made within the State, *and that, upon his failure to make such appointment or designation, the serv-*

ice may be made upon a certain public officer, and that judgment rendered against the corporation after such service shall bind the stockholders, whether within or without the State. In such cases, the service is held binding because the corporation, or the stockholders, or both, as the case may be, must betaken to have consented that such service within the State shall be sufficient and binding; and no individual is bound by the proceedings who is not a stockholder. *Lafayette Ins. Co.* v. *French, 18 How., 404; Ex parte Schollenberger, 96 U. S., 369; Pennoyer* v. *Neff, 95 U. S., 714, 735; Vallee* v. *Dumergue, 4 Exch., 290, 303; Copin* v. *Adamson, L. R., 9 Exch., 345, 355, 356, and 1 Ex. D, 17.*"

The Civil District Court, in this suit, expressly adjudged that this method of service was proper (Rec., pp. 10, 11). If this decision was erroneous, or if the act of 1904 permitting service on the Secretary of State was in violation of any provision of the Federal Constitution, the remedy for the correction of the error, was by appeal to the Supreme Court of Louisiana, and by writ of error directed by this court to that tribunal in the event of a decision adverse to the Southern Railway Company.

At all events an independent action to set aside the decree for nullity, especially in a case arising in Louisiana, was not the proper remedy. It was so adjudged in *Barrow* v. *Hunton, 99 U. S., 80.*

There, A having recovered a judgment against B and C in the District Court for the Parish of New Orleans, B, on the ground among others that the judgment, having been obtained by default and without lawful service upon him, was void, filed a petition in that court praying for a decree of nullity and for an injunction. An injunction

and citation were issued and served upon A, who thereupon, alleging that he was a citizen of Missouri and B a citizen of Louisiana, prayed that the action of nullity be removed to the United States Circuit Court. It having been so removed, and B's petition amended by converting it into a bill so as to conform to the practice in equity, that court, on a final hearing, dissolved the injunction and dismissed the bill. It was held, that the causes relied on for nullity of the judgment being, under the Code of Louisiana, as well as under principles of general jurisprudence, vices of form, the proceeding by petition was substantially a continuation of the original suit, and that the Circuit Court could not take cognizance thereof. Mr. Justice Bradley said:

"The question presented with regard to the jurisdiction of the Circuit Court is, whether the proceeding to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States Court could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different states. Such a result would be totally inadmissible.

"On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they consti-

tute an original an independent proceeding, and according to the doctrine laid down in *Gaines* v. *Fuentes, 92 U. S., 10,* the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the State courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof.

"It would seem apparent that the proceeding in the present case was one that affected the mere regularity of the original judgment. In the common law practice, it would have been a motion to set aside the judgment for irregularity, or a writ of error *coram vobis.*"

The provisions of the Code of Practice of Louisiana are then referred to, and it is shown that Article 606 specifies the vices of form for which a judgment can be annulled; as, when against a minor appearing without a curator, or against a married woman appearing without the authority of her husband; *where the defendant is condemned by default without being cited;* where the judge was incompetent to try the suit; and *where defendant has not been legally cited, and has not entered appearance, and judgment is by default.*

It may be urged that the Southern Railway Company was not engaged in business in the State of Louisiana, and for that reason did not come within the provisions of the act of 1904. The State court, whether erroneously or not, decided that it was so engaged, and the correctness of that decision could only be tested by appeal or writ of

error from the State court, and not by an action to enjoin the enforcement of the judgment, instituted in the Federal Court.

The right to grant the injunction restraining the Petitioner's proceedings in the State court is sought to be sustained by Judges Parlange and Saunders, on the authority of *Terre Haute & I. R. Co.* v. *Peoria & P. U. R. Co., 82 Fed. Rep., 943, National Surety Co.* v. *State Bank, 120 Fed. Rep., 593,* and *Massie* v. *Buck, 128 Fed. Rep., 27,* all of which proceed upon a curious misconception of the case of *Marshall* v. *Holmes, 141 U. S., 589,* which Judge Grosscup, in the first of the cases cited, erroneously stated to be an action "begun originally in the Federal court" (*82 Fed. Rep.,* p. *946*).

This misunderstanding apparently originated from a hasty glance at the headlines immediately below the title of the case: "Error to the Court of Appeals for the Second Circuit *of the State of Louisiana.*" The words italicized were apparently overlooked, and the case was treated as though it had come to this court from the United States Circuit Court of Appeals for the Second Circuit; whereas, it in fact was brought here on a writ of error directed to an inferior appellate tribunal of the State of Louisiana.

A more careful consideration of that case shows these facts: Mrs. Marshall, a citizen of New York, filed a petition for injunction in the Eighth District Court for the Parish of Madison, Louisiana, representing that one David Mayer had recently obtained in a suit *in that court* a judgment against her for the sum of $127.50, on false testimony and forged documents, and under circumstances, indicating fraud in the concoction

of the judgment, which could not have been known by her at the time of the trial, and which had been discovered since the rendition of judgment and since the lapse of the legal delays within which a motion could be made for a new trial. She asked that an injunction against Mayer, the judgment creditor, and Holmes, the Sheriff of the Parish, restraining them from executing the judgment, should be grantd; that the judgments be annulled and avoided, and that she have general and equitable relief. *A writ of injunction was issued as prayed for, by the State Court.* Thereafter Mrs. Marshall filed a petition for the removal of her suit into the Circuit Court of the United States, upon the ground of diversity of citizenship of the parties. *The court made an order refusing the application for removal* and proceeded with the trial of the case, rendering judgment for the defendants dissolving the injunction, and authorizing Mayer to execute his judgment.

The only question for determination by this court, related to the removability of the suit from the State to the Federal Court, and it having been held that the case involved the jurisdictional amount of $500, exclusive of costs, and that it did not come within the rule of *Barrow* v. *Hunton, supra,* the cause was removable from the State court and should have been remanded to the Eighth District Court for the Parish of Madison, with directions to set aside all orders made after the filing of the petition and bond for removal of the suit into the Circuit Court of the United States, and to proceed no further, Mr. Justice Harlan saying:

"It was not, however, for the State court to

disregard the right of removal upon the ground simply that the averments of the petition were insufficient or too vague to justify a court of equity in granting the relief asked. The suit being, in its general nature, one of which the Circuit Court of the United States could rightfully take cognizance, it was for that court, after the cause was docketed there, and upon final hearing, to determine whether, under the allegations and proof, a case was made which, according to the established principles of equity, entitled Mrs. Marshall to protection against the judgments alleged to have been fraudulently obtained."

That is an entirely different proposition from that which is presented in the present case—as to whether or not the Federal court had the right to grant an injunction restraining the proceedings in the State court.

It is true that in the course of his opinion, Mr. Justice Harlan said:

"While it cannot require the State court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a State court. It would simply take from him the benefit of judgments obtained by fraud."

These remarks are purely *obiter,* and the decision reached does not depend upon their correctness. Prior to the filing of the removal proceedings an injunction had been granted by the State

court, and on the removal that injunction would have continued in force.

So far as the paragraph now cited is to be construed as declaring that Section 720 of the United States Revised Statutes is not applicable, because an injunction would operate directly upon the judgment creditor and not upon the State court, it is in direct conflict with *Peck* v. *Jenness* (*7 How., 612, 624*), *Moran* v. *Sturges, supra, Central National Bank* v. *Stevens* (*supra*), and a host of other authorities to which these cases refer, and also *Yick Wo* v. *Crowley, 26 Fed., 209; Wagner* v. *Drake, 31 Fed., 851; Dillon* v. *Kansas, etc., R. Co., 43 Fed., 111;* and *Whitney* v. *Wilder, 54 Fed., 555.*

It has already been shown that in *Terre Haute & I. R. Co.,* v. *Peoria R. Co., 82 Fed. Rep., 943* Judge Grosscup misconceived the history of *Marshall* v. *Holmes.* It is further contended that that learned Judge did not carefully study the opinion, for he says:

"The injunction was issued in aid of the main purpose of the suit, restraining the judgment creditors from issuing an execution upon such judgment pending the final decree."

The only injunction that was issued in that case, was issued by the State court; while the injunction in the present case was issued by the Federal court.

So, in *National Surety Company v. State Bank, 120 Fed. Rep., 593,* Judge Sanborn, citing *Marshall v. Holmes, supra,* said:

"Section 720 forbids the Federal courts from staying the proceedings of the State courts, but it does not grant to litigants of whom the Federal courts have jurisdiction unlimited license to use the unconscionable judgments of the State court

to inflict irremediable injury upon the defendants. An injunction, as in Leathe *v.* Thomas, 97 Fed. Rep., 138, which restrains a sheriff—an officer of the State court—from executing the judgment of that court, is a plain violation of the Federal statute, because it stays the proceedings of the State court, and it cannot be sustained. *But an injunction which forbids the plaintiff in such a judgment from making an inequitable use of it acts upon him—upon his person only.* It forbids him from perpetrating a wrong, but it neither restrains nor stays the proceedings of the State court or of its officer, and it does not fall under the ban of the section of the statute under consideration."

The authorities above referred to indicate that this is not only a misconception of *Marshall v. Holmes,* but utterly ignores the long line of cases which have just been adverted to, in which the courts have held that an injunction against a party to a proceeding in a State court, is such a stay of proceedings as is sought to be prohibited by Section 720.

In *Massie v. Buck, 128 Fed. Rep., 27,* an injunction was granted which merely restrained a defendant from selling, incumbering or in any way disposing of lands purchased at a sheriff's sale. Consequently it did not refer to proceedings in a State court, but to the disposition of property acquired after the completion of the last step in the litigation in the State court.

On that theory, it might be said that the injunction did not violate Section 720, but Judge Shelby evidently based his decision upon a wrong reason, for he said, citing the cases already referred to:

"A Federal court, in a proper case, has jurisdiction to cancel titles made by authority of a de-

cree of a State court, and this statute (Section 720) does not deprive a Federal court of jurisdiction to enjoin proceedings in a State court when such injunctive remedy is ancillary to granting relief in a case of which the Federal court has jurisdiction."

Other decisions relied upon in the cases just referred to may be briefly distinguished from the present.

Dietzsch v. *Huidekoper, 103 U. S., 494,* was one in which the plaintiff removed into the proper Circuit Court of the United States a suit in replevin brought in a State court. At the instant of removal, all the incidents and processes primarily issued by the State Court were transferred to the Federal Court. When the latter acted, therefore, it was upon its own records. The State Court was ousted of jurisdiction; there was nothing before it as to which judicial action could be taken, and, consequently, Section 720 of the Revised Statutes was in no manner involved.

Johnson v. *Waters, 111 U. S., 640,* was a creditor's bill filed in a Circuit Court of the United States, wherein it was sought to set aside a sale of real estate of a deceased person made under the orders of a State Probate Court, on the ground of fraud. The bill was maintained and the judgment of the State Court was successfully impeached on the ground stated, and the effect of the decree was to subject the property thus fraudulently acquired to the payment of the creditor's claim. No injunction was asked for or granted by the Federal Court to stay any proceedings in the State Court. The sole purpose of the suit was to

reach the fruits of the fraudulent decree after it had been fully carried into effect, and not to enjoin any proceedings in the State Court.

Arrowsmith v. *Gleason, 129 U. S., 86,* was a bill filed to set aside a sale of an infant's land fraudulently made by his guardian under authority derived from a Probate Court. There no injunction was asked for or granted. The decree of the State Court had been followed by a sale. There were no proceedings to be enjoined. It was merely attempted to set at naught a judgment fraudulently obtained.

Additional cases in support of our contention should also be called to the Court's attention.

Nougue v. *Clapp, 101 U. S., 551,* arose on a bill filed in a Federal Court, charging that proceedings had been instituted and a summary order of sale obtained in a State Court as a result of a fraudulent conspiracy, by which the plaintiff was deprived of his property. There was no application for injunctive relief. Upon demurrer to the bill, it was dismissed; and upon appeal to this court, Mr. Justice Miller said:

"We think that for this court, after all this has been done, to undertake to decree that what that court did is void, to sit in review on its judgment, and reverse its decree and set aside its sale, in a case where its jurisdiction is undoubted, is unwarranted by the relations which subsist between the two courts. It would be an invasion of the powers belonging to that court, and such a doctrine would, upon the simple allegation of fraud practised in the court, enable a party to retry in the Federal Court any case decided against him in a State Court."

See also *Mutual Reserve Assn.* v. *Phelps, 190 U. S., 147.*

In *Hemsley* v. *Meyers, 45 Fed. Rep., 283,* Judge Caldwell said, referring to Section 720:

"This section (720), save the exception, is as old as the judicial system of the United States. Its prohibition is absolute and unqualified, except where the injunction is authorized by law in proceedings in bankruptcy. This exception serves to emphasize the prohibition as to all other cases. In cases where the jurisdiction of the court of the United States first attaches, the statute has no application; but in the cases we are considering the jurisdiction of the State courts first attached, and that fact, independently of the statute, according to a well-settled rule, is a bar to the jurisdiction of this court. To the observance of the rule enunciated by this section and other cognate rules we are indebted for the almost uniform harmonious relations that have existed between the State and the United States courts, from the foundation of the government down to the present time. The rule would probably have been the same independently of the statute. The State courts observe the rules towards the courts of the United States upon principle, and without any statute requiring them to do so. It is not merely a rule of comity, but an absolute rule of law, obligatory on the courts of both jurisdictions, and absolutely essential to the maintenance of harmonious relations between the State and the United States courts, and indispensable to the due and orderly administration of justice in both. Appeals may be taken in certain cases from the State courts to the Supreme Court of the United States, and in this way suitors claiming a right or privilege under the constitution of the United States, or an act of Congress, or a treaty, may have the validity of their claim finally determined by the Supreme Court of the United States; but the district and circuit courts of the United States possess no appellate or supervisory juris-

diction over the State courts. The circuit courts of the United States and the State courts are each destitute of all power, either to restrain or review the process or proceedings in the other. This rule has had the approval of the courts, lawyers, legislators, and laymen from the beginning of our system of government. The rule commends itself to the common sense of all mankind, and there can be no higher evidence of the soundness of a rule of law than that there is a universal consensus of opinion that it is sensible and just."

In *Aultman & Taylor Co.* v. *Brumfield, 102 Fed., 14-15,* the Court said:

"A repeal or modification of section 720 should not be lightly presumed. To preserve harmony and comity between the courts of the United States and those of the state, it is essential that it shall be observed in its spirit as well as in its letter. Under the act of 1875, as amended by the act of August 13, 1888, the circuit courts of the United States are given original jurisdiction, 'concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, * * * arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority.' So, any suit of which original jurisdiction is given may be removed by the defendant from a state court to the circuit court of the United States.

"But it is well settled that, although the decision of a case pending in a state court may depend upon the construction and application of the constitution of the United States, the suit is not removable by the defendant unless the federal question appears on the face of the plaintiff's pleadings. If it does not so appear from the plaintiff's statement of his own claim, the want cannot be supplied by any pleadings filed by the defendant. Chappell *v.* Waterworth, 155 U. S., 102, 15 Sup. Ct., 34, 39, L. Ed. 85; Tennessee *v.* Union & Planters' Bank, 152 U. S., 454, 14 Sup. Ct., 654, 38 L.

Ed., 511; Galveston, H. & S. A. R. Co. *v.* Texas, 170 U. S., 26, 78 Sup. Ct. 603, 42 L. Ed., 1017.

"The remedy of a defendant in a suit in which the decision must turn upon the construction or application of the constitution of the United States, where the federal question is not disclosed by the plaintiff's statement of the case, is to present the question by his pleadings, and, if the right thus set up under the constitution or laws of the United States is denied to him by the highest court of the state to which the controversy can be carried, he may sue out a writ of error from the Supreme Court of the United States, and thus obtain a review of the decision of the state court upon the federal question directly involved. It would be strange, indeed, if a defendant to an action in a state court, whose defense involved the construction and application of the constitution of the United States, but who could not remove the suit because the federal question did not appear upon the face of the plaintiff's statement of his claim, should have the right to transfer the case to a court of the United States by an *independent injunction bill,* whereby the state court should be deprived of jurisdiction, and the decision of the same question drawn into the United States Court. The provisions for a *review by writ of error* afford to the complainant ample means for obtaining redress, if in fact it has been subjected to the deprivation of rights secured to it by the provisions of the fourteenth amendment. The conclusion we reach is that this court can grant no efficient or practical relief without it can enjoin the pending suit in the state court and draw to itself the decision of all the questions involved by the defense which can be there presented. This we cannot do without violating the plain terms of section 720. The injunction heretofore granted must be dissolved, and the bill dismissed for want of equitable jurisdiction, but without prejudice to the right of complainant on the merits of the case."

The principle involved in this matter is of transcendent importance. The integrity of our judicial system is at stake. Thus far in our dual governmental system there has been a remarkable freedom from direct conflict between the Federal and State judicial tribunals. That gratifying condition is due, in large measure, to the wisdom of the founders of our government, who, in its earliest days, foresaw the dangers which would flow from attempts on the part of the Federal courts to enjoin proceedings in State courts, and forbade such interference by act of Congress; and the principle of this legislation was applied by this Court at an early period, to nullify the attempts of the State courts to enjoin proceedings in the Federal tribunals.

It comes, therefore, with something of a shock to find that a Federal court has granted an injunction restraining judicial proceedings in a State court, where the suit is brought for no other purpose than to secure such injunction, where the bill of complaint contains no other prayer for relief than that of the restraint of the proceedings in the State court, and where the record does not even disclose the slightest reason for the granting of such extraordinary relief and negatives the possibility that it is sought to preserve and safeguard the priority of jurisdiction of the Federal court.

III.

It is respectfully submitted that leave to file the petition for writs of habeas corpus and certiorari be granted.

HENRY L. LAZARUS,
Petitioner's Solicitor.

LOUIS MARSHALL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1907.

No. 13, Original.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK

EX PARTE: In the matter of EPHRAIM SIMON,
Petitioner.

Brief on Petition for Writs of Habeas Corpus and Certiorari.

HENRY L. LAZARUS,
Solicitor for Petitioner.

LOUIS MARSHALL,
Of Counsel.

B. H. TYRREL, PRINTER, 206-208 FULTON STREET, NEW YORK.

Supreme Court of the United States,

OCTOBER TERM, 1907.

No. 13 Original.

EX PARTE:
IN THE MATTER OF EPHRAIM SIMON, Petitioner.

On Petition for Writs of Habeas Corpus and Certiorari.

PETITIONER'S BRIEF.

The petitioner, a citizen of Louisiana, now in the custody of the United States Marshal at New Orleans under an order of the Circuit Court of the United States for the Eastern District of Louisiana, having obtained leave of the Court to do so, has filed his petition for relief by *habeas corpus* from further detention and restraint, on the ground that the order of commitment was entered by the court without jurisdiction, and in direct violation of Section 720 of the Revised Statutes of the United States.

There is no dispute as to the facts, the allegations of the petitioner being admitted.

On December 1, 1904, Ephraim Simon, the petitioner, filed in the Civil District Court for the

Parish of Orleans, in the State of Louisiana, a duly constituted court of that state, a petition in an action brought by him against the Southern Railway Company, for the recovery of damages sustained by him while a passenger on one of the trains of that company, resulting from a collision due to its gross and criminal negligence. The amount of damages claimed was Thirteen thousand three hundred and forty-eight Dollars ($13,348), and the petition, with unusual particularity, indicated the nature of the injuries sustained and the resultant pecuniary damages for which recovery was sought (Record, pp. 6-10). The prayer for relief is as follows (Rec., p. 10):

"Wherefore, the premises considered, your petitioner prays that the Southern Railway Company, defendant herein, be cited to appear in answer hereto, and that, it having failed to comply with the provisions of Section One of Act No. 54 of the Session of 1904, the service of process in this suit be made upon Hon. John T. Michel, Secretary of State, said service, so made, to be a service upon the said Southern Railway Company, as provided for in the act aforesaid, and that, after the legal delays and due proceedings had, there be judgment in favor of your petitioner and against the said Southern Railway Company in the full sum of Thirteen thousand three hundred forty-eight ($13,348.00) Dollars with legal interest thereon from judicial demand until paid.

"Petitioner prays for trial by jury, and for costs and for general relief."

Thereupon, on December 2, 1904, a citation was issued to the defendant, through the Secretary of State, to comply with the demand contained in the petition, a copy of which accompanied the cita-

tion, or to deliver its answer to the same in the office of the clerk of the Civil District Court for the Parish of Orleans, within ten days after service. The citation and petition were served by the Sheriff on the Southern Railway Company, by personal service on the Secretary of State on December 3, 1904 (Rec., p. 11).

On January 10, 1905, the defendant having failed to answer, judgment by default was ordered by the court against the defendant. A jury was impaneled, and witnesses sworn. The court charged the jury, which found a verdict in favor of the plaintiff for the sum of Thirteen thousand three hundred and forty-eight Dollars ($13,348), the amount demanded in the petition, with interest and costs. The court thereupon rendered judgment in open court, on January 16, 1905, which judgment was read and signed in open court, on January 20, 1905, the judgment, after reciting the matters already referred to, providing:

"On motion of counsel said verdict was ordered recorded and judgment entered in accordance therewith. Considering the verdict of the jury in this matter, *and that the demand of plaintiff was proved,* and the law and the evidence being in favor of said plaintiff,

"It is ordered, adjudged and decreed that the default herein entered on January 10, 1905, be now confirmed and made final and accordingly that there be judgment in favor of the plaintiff Ephraim Simon and against the defendant Southern Railway Co., in the full sum of Thirteen thousand three hundred and forty-eight ($13,348.00) Dollars, with legal interest thereon from date of judgment until paid and for costs" (Rec., pp. 12, 13).

Article 264 of the Louisiana Constitution of 1898, provides:

"Art. 264. No domestic or foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the state upon whom process may be served."

Act No. 54 of the Louisiana General Assembly of 1904, is as follows:

"AN ACT

To carry into effect Article 264 of the Constitution of 1898, in respect to foreign corporations doing business in this State.

SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That it shall be the duty of every foreign corporation doing any business in this State to file in the office of the Secretary of State a written declaration setting forth and containing the place or locality of its domicile, the place or places in the State where it is doing business, and the name of its agent or agents or other officer in this State upon whom process may be served.

SEC. 2. Be it further enacted, etc., That whenever any such corporation shall do any business of any nature whatever in this State without having complied with the requirements of Section 1 (one) of this act, it may be sued for any legal cause of action in any parish of the State where it may do business, and service of process in such suit may be made upon the Secretary of State the same and with the same validity as if such corporation had been personally served.

SEC. 3. Be it further enacted, That all laws and parts of laws in conflict or inconsistent with this act be and the same are hereby repealed."

All of the proceedings in the action instituted by the Petitioner, were in the usual course of legal procedure and were set forth in the newspaper reports of the court proceedings, and Judge Sommerville, before whom all the proceedings took place in regular course, so indicates in his deposition (Rec., p. 19), which contains the following:

"Before signature of the judgment became due, Mr. Harry H. Hall was aware of the judgment and spoke to me on the subject. No application was made to me for a new trial, and the judgment was signed January 20, 1905. No application was made to me by the defendant in the case referred to for any relief from the judgment therein."

Mr. Harry H. Hall, referred to in this deposition, has acted as counsel and in other capacities for the Southern Railway Company at New Orleans, and admits that on or about January 17, 1905, he saw in one of the daily newspapers of New Orleans, or in the Court Bulletin, notice of the rendition of the verdict against the Southern Railway Company in the case brought against it by the petitioner, and that on the morning of that day he examined the minutes of the Civil District Court of Division D, presided over by Judge Walter D. Sommerville, for the purpose of verifying the publication, and that Judge Sommerville called Mr. Hall to him, and inquired if he represented as defendant's counsel in New Orleans, the Southern Railway Company, to which inquiry he replied that he did not represent the company as its counsel, and that the Railway Company was not represented in the city by any counsel or by any agent (Rec., p. 51).

On February 6, 1905, the Southern Railway Company filed a bill of complaint in the United

States Circuit Court, Eastern District of Louisiana, in a suit against the Petitioner, Ephraim Simon, in which it seeks relief as follows (Rec., p. 4):

"In consideration whereof and for as much as your Orator is remediless in the premises and by the strict rules of the common law, and is only relievable in a court of equity where matters of this kind are cognizable, and relievable, your Orator therefore prays that the said Ephraim Simon, who is the plaintiff as aforesaid in said action at law, entitled Ephraim Simon *v.* the Southern Railway Company, No. 74869 Civil District Court for the Parish of Orleans, his counselors, attorneys, solicitors or agents *may be restrained by an injunction issuing out of this court from further proceeding against your Orator, under the said suit and judgment, or from issuing execution thereon, or attempting thereunder to seize any property movable or immovable of your Orator, or in any manner attempting to enforce the same.*"

The allegations of this bill are most extraordinary. After alleging the diversity of citizenship of the parties, it is admitted that the Petitioner was, on February 8, 1904, while a passenger on one of the complainant's trains, injured by a collision. It is stated that by such collision both of the ankles of the Petitioner were slightly sprained, he sustaining no other or further injury, and that notwithstanding the insignificance of the sprains, he presented to the complainant an exaggerated and untrue statement of his injuries, falsely claiming that he had been damaged by reason of the collision, in the sum of Five thousand Dollars; that the complainant had the injuries examined by a surgeon, who pronounced them slight, and offered Three hundred and fifty

Dollars in full compensation, which he refused to accept, but considered and discussed the acceptance of Seven hundred and fifty Dollars, which was not agreed to, and the matter was then temporarily left in abeyance with a view of having the Petitioner modify his demand; that the Petitioner, instead of terminating the discussion and attempted adjusting by refusal, surreptitiously and without the complainant's knowledge, entered against it in the Civil District Court for the Parish of Orleans, a suit for damages, in which he falsely and fraudulently pretended that he had been injured to the extent of Thirteen thousand three hundred and forty-eight Dollars; that the citation issued in this suit was served on the Assistant Secretary of State of Louisiana on December 3, 1904; that the complainant was not a foreign corporation doing business in the State of Louisiana, and that none of its lines of railway entered or traversed any part of the State; that the attempted service of the citation was absolutely null and void for the purpose of bringing the complainant under the jurisdiction of said Civil District Court; that the petitioner caused a default to be entered in the action brought by him, a jury to be impanelled, and fraudulently caused to be entered by the jury a verdict of Thirteen thousand three hundred and forty-eight Dollars, which verdict was subsequently embodied in a judgment of the Civil District Court; that in confirming the default taken in the action the petitioner was guilty of subterfuge and fraud in claiming and adducing testimony to the effect that he had sustained damages in the sum of Thirteen thousand three hundred and forty-eight Dollars, "he knowing full well that his claim, as orig-

inating with himself and before discussion or suggestion of compromise was for Five thousand Dollars, the total damage, which he pretended to have sustained or suffered by reason of said collision, and he having been apparently willing to accept, after discussion, one-half of that sum"; that the claim for loss of profit, deterioration of stock, extra cost of manufacturing stock, constituting a part of Petitioner's claim for damage, were claims that he well knew were "fraudulent, fictitious and utterly untrue, and even if true, would be such remote and consequential damages as could not be recovered"; that the complainant never received from the Secretary of State the citation issued out of the Civil District Court; nor did it have any knowledge of the pendency of the proceedings until after the rendition of judgment; "that the verdict of the jury and the judgment of the Civil District Court were unconscionable as having been rendered fraudulently and upon false testimony, and without due and proper citation or notice to your Orator; and that it would be against good conscience to allow said judgment to be used to extort money that is not owing from your Orator, which has no remedy at law in the premises, and has a complete and meritorious defence to the claim on which said judgment is based."

It is further alleged:

"11. And your Orator avers that it was prevented from availing itself of its defense to the cause of action embodied in said proceedings by the accident or failure of its not receiving from said Secretary of State any citation or notice of said proceeding, and that it has been without negligence either of itself or its agents in the premises. Your

Orator avers that this Court has plenary jurisdiction *to restrain the enforcement of such judgment*, to which your orator has a meritorious defence, which it was prevented by fraud and accident, unmixed with its own negligence from adducing.

"12. Your Orator avers that unless prevented and restrained, the said Ephraim Simon will attempt to collect said fraudulent judgment and will cause to be issued thereon, out of the Civil District Court, a writ of *fieri facias*, under and by virtue of which he will attempt to seize your Orator's property and thereby cause it continuous and irreparable injury.

"And your Orator avers that it is informed and verily believes that such action is about to be taken by the said Ephraim Simon, and that it is entitled to a writ of injunction and restraining order to prevent such action.

"Your Orator annexes and makes part of this bill a copy of the said record in the State Court and a letter from the Secretary of State marked Exhibit 'A' and Exhibit 'B'" (Rec., p. 4).

In the letter from the Secretary of State referred to, he states:

"that acting under the instructions of the Attorney General we simply filed the copy of citation and petition made on us in the case of 'Ephraim Simon *versus* The Southern Railway Company, No. 74869 Civil District Court Parish of Orleans,' the said Company having failed to designate an agent upon whom service of process can be made as required by law" (Rec., p. 14).

On this showing, Judge Parlange issued a restraining order on February 6, 1905, enjoining the Petitioner to absolutely refrain and desist from further proceeding against the complainant

under the said judgment in the action entitled Ephraim Simon *v.* The Southern Railway Company, No. 76869 Civil District Court for the Parish of Orleans, or from issuing execution thereon, or attempting thereunder to seize any property, movable or immovable, of the complainant, or in any manner attempting to enforce the same (Rec., p. 14).

On a subsequent hearing, at which all of the allegations of fraud were specifically denied, and no proof was given indicating to the slightest extent that there had been any fraud or wrongful action on the part of the Petitioner, and on which the affidavits presented by the complainant were in absolute refutation of the material allegations of the complaint (Rec., pp. 45-49), a preliminary injunction was issued as prayed for in the bill of complaint (Rec., pp. 70, 71).

On November 8, 1907, pursuant to an authorization from the Civil District Court for the Parish of Orleans, the Petitioner caused writs of *fieri facias* and garnishment to be issued against the Southern Railway Company, under which the Sheriff undertook to seize property of the company (Rec., pp. 86-88). Proceedings to punish the Petitioner for contempt followed, and came on for hearing before Honorable Eugene D. Saunders, United States District Judge, on November 15, 1907. The Petitioner, while disclaiming any intention to treat the court or its orders with disrespect, insisted that the court was without power or jurisdiction to issue a writ of injunction to stay proceedings in the State Court, and being without power or jurisdiction to issue the writ, its breach cannot be construed as a contempt of court (Rec., pp. 89, 90). This contention was, however, over-

ruled, and judgment was rendered, that the Petitioner "is hereby fined the sum of One hundred dollars for contempt of this court, and that he stand forthwith committed to be imprisoned in the Parish Prison for the Parish of Orleans until said fine is paid, and accordingly, the marshal of this court is ordered at once to take the said defendant Ephriam Simon, in custody until the fine hereby imposed is paid."

Pursuant to this judgment, the Petitioner is now in the actual custody of the United States Marshal at New Orleans (Rec., p. 103).

POINTS.

I.

The petitioner being restrained of his liberty by a United States Marshal, under a judgment of the United States Circuit Court, which is claimed to be void, habeas corpus is the proper remedy to test the validity of the imprisonment.

The rule on this subject is stated with great clearness by Mr. Justice Miller in *Ex Parte Fisk, 113 U. S., 713-618*:

"When, however, a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court has no authority to make, the order it-

self, being without jurisdiction, is void and the order punishing for contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will by its writ of *habeas corpus*, discharge the prisoner. It follows necessarily that on a suggestion by the prisoner, that, for the reason mentioned, the order under which he is held is void, this court will, in the language of the statute, make 'inquiry into the cause of the restraint of liberty' (Sec. 752, Rev. Stat.)."

Ex parte Kearney, 7 Wheat., 38;
Ex parte Wells, 18 How., 307;
Ex parte Lange, 18 Wall., 163;
Ex parte Parks, 93 U. S., 18;
Ex parte Siebold, 100 U. S., 371;
Ex parte Rowland, 104 U. S., 604;
Ex parte Bain, 121 U. S., 1;
In re Ayers, 123 U. S., 443.

The question here presented is one purely of jurisdiction, and not one of fact as to whether or not a decree which the court had the jurisdiction to pronounce has been disobeyed. In that respect the case differs from *In re Debs, 158 U. S., 595* and *In re Chetwood, 165 U. S., 462* relied upon by the respondent.

II.

The preliminary injunction issued out of the United States Circuit Court, which restrained the proceedings of the petitioner in the Civil District Court of Louisiana, being in contravention of Section 720 of the United States Revised Statutes, was a nullity, and its disregard by the petitioner does not constitute contempt.

THE HISTORY AND MEANING OF THE SECTION.

Section 720 of the United States Revised Statutes, which had its genesis in Section 5 of the Act of March 2, 1793, Ch. 22, 1 Statutes at Large, 334, reads as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

This section applies to the Supreme Court as well as to the Circuit Courts.

Slaughter House Cases, 10 Wall., 273.

Its prohibition extends not only to the proceedings in a State Court up to and including the final judgment, but to the entire proceedings from the commencement of the suit until the execution issued on the judgment or decree is satisfied.

Wayman v. *Southard, 10 Wheat, 1;*
Leathe v. *Thomas, 97 Fed. Rep., 126;*
Fenwick Hall Co. v. *Old Saybrook, 66 Fed. Rep., 389;*
Haines v. *Carpenter, 91 U. S., 254;*
Dial v. *Reynolds, 96 U. S., 340;*
Sargent v. *Helton, 115 U. S., 348.*

The apparent oversight of the authorities by the court below, and its misinterpretation of § 720 justifies the following excerpts from the opinions of this Court.

In *Haines* v. *Carpenter, supra,* Mr. Justice Bradley said:

"A mere statement of the bill is sufficient to show that it cannot be sustained. Whilst it undoubtedly presents some matters of equitable consideration, they are so mixed up with others of a different character, or which cannot be entertained by the Circuit Court of the United States, and which constitute the main object and purpose of the suit, as to make the bill essentially bad on demurrer. In the first place, the great object of the suit is to enjoin and stop litigation in the State courts, and to bring all the litigated questions before the Circuit Court. This is one of the things which the Federal Courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in section 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the Bankrupt Law. This objection alone is sufficient ground for sustaining the demurrer to the bill."

In *Dial* v. *Reynolds, supra,* Mr. Justice Swayne said:

"There are two objections to these bills: 1. The gravamen of what is desired as to Reynolds is an injunction to prevent his proceeding at law in the State court. Without this, all else is of no account. Any other remedy would be unavailing. Such an injunction, except under the Bankrupt Act, no court of the United States can grant. With this exception it is expressly forbidden by law."

In *Sargent* v. *Helton, supra,* Mr. Justice Woods, after citing this provision, said:

"The sole purpose of the bill in this case was to restrain the execution of an order of the Circuit Court for the county of Escambia, a court of the State of Alabama, and no relief, which, upon the averments of the bill, this court could grant would be effectual without the writ of injunction prayed for. The Circuit Court of the United States was, therefore, deprived of power, by the section just quoted, to protect the rights of the plaintiff, unless the writ of injunction was authorized by the law relating to the proceedings in bankruptcy, *Haines* v. *Carpenter, 91 U. S., 254; Dial* v. *Reynolds, 96 U. S., 340.* In a timely suit brought by the assignee in bankruptcy, there is no doubt that, upon a proper showing, the Circuit Court might have enjoined proceedings in the attachment suits in the State court. This is the express ruling in *Chapman* v. *Brewer, 114 U. S., 158.* But the plaintiff in this case is not the assignee in bankruptcy. Sullivan, the transferee of Sargent, the vendee at the bankruptcy sale, was the real plaintiff and the only party who, at the final hearing, asked for the injunction. The question, therefore, is, does any law relating to proceedings in bankruptcy authorize an injunction at the instance of a purchaser of property

at a bankruptcy sale, or his vendee, to stay proceedings in a State court?

"There is no act of Congress expressly authorizing a Circuit Court of the United States to restrain by injunction, even at the suit of an assignee in bankruptcy, proceedings in a State court. The case of *Chapman* v. *Brewer, ubi supra,* was a bill in equity filed by an assignee in bankruptcy to enjoin the defendant from selling the property of the bankrupt upon execution issued out of the State court. The jurisdiction to issue the writ in that case was placed upon § 5024 Rev. Stat., which authorized the District Court, sitting in bankruptcy, when a petition in involuntary bankruptcy had been filed, to restrain by injunction all persons from interfering with the debtor's property; and upon § 4979, which gives the Circuit Court concurrent jurisdiction with the District Courts of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest in any property transferable to or vested in him. * * * The case makes it clear that the injunction to stay proceedings in a State court is only allowed by the statute for the purpose of aiding the assignee in bankruptcy to discharge his duty and of protecting the property of the bankrupt estate for the equitable distribution among the creditors. But there is no act of Congress from which can be inferred authority to a court of the United States to issue an injunction to restrain proceedings of a State court, at the instance of a purchaser at bankruptcy sale, or of the vendee."

In *Moran* v. *Sturges, 154 U. S., 267,* Chief Justice Fuller said of the same provision:

"The general rule is that State courts cannot enjoin proceedings in the courts of the United States, and this was held at a very early day, in reference to a judgment of the Circuit Court; *M'Kim* v. *Voorhies, 7 Cranch, 279, 281;* while on the other hand, it was determined that the Circuit

Court would not enjoin proceedings in a State court, and any attempt of that kind was forbidden by act of Congress. *Diggs* v. *Wolcott, 4 Cranch, 179; Act of March 2, 1793, c. 22, § 5, 1 Stat. 333, 335.* In *Riggs* v. *Johnson County, 6 Wall., 166, 195*, this court, speaking through Mr. Justice Clifford, said: 'State courts are exempt from all interference by the Federal tribunals, but they act destitute of all power to restrain either the process or proceedings in the national courts. Circuit Courts and State courts are separably and independently of each other, and in their respective spheres of action, the process issued by the one is as far beyond the reach of the other, as if the line of division between them was traced by landmarks and monuments visible to the eye,' * * *

Mr. Justice Story was of opinion that to the doctrine which permits the courts of one State in proper cases to enjoin persons within their jurisdiction from instituting legal proceedings in other States, or from further proceeding in actions already begun, there exists the exception that the State courts cannot enjoin parties from proceeding in the courts of the United States, *nor the latter enjoin them from proceeding in the former courts,* an exception based upon peculiar grounds of municipal and constitutional law. Story Eq., § 900; Story Const., § 1757.

"By the Judiciary Act of March 2, 1793, c. 22, § 5, 1 Stat., 334, the granting of injunction to stay proceedings in any court of a State was prohibited in express terms, and it was held in *Peck* v. *Jenness, 7 How., 612, 624*, that even the District Court sitting in bankruptcy could not issue an injunction to stay a creditor of the bankrupt from proceeding in a State court [*before the amendment of the section by U. S. R. S.*], Mr. Justice Grier saying: 'It is a doctrine of law too long established to require a citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause,—and whether its decision be correct or otherwise, its

judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away, by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy* v. *The Earl of Cassilis, 2 Swanston, 313,* Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. *The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.*"

"The provision of the act of 1793 was carried forward into section 720 of the Revised Statutes, with the addition of the words 'except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy,' and under that exception restraint by injunction was held authorized in Chapman *v.* Brewer, 114 U. S., 158. * * *

"A resort to injunction in proceedings in admiralty for the limitation of the liability of ship owners under an act of Congress, passed since the act of 1793, and expressly provided that after the

institution of such proceedings 'all claims and proceedings against the owner shall cease;' Act of March 3, 1851, c. 43, § 4; 9 Stat., 635; Rev. Stat., § 4825; was sustained in *Providence & New York Steamship Co. v. Hill Manufacturing Co., 109 U. S., 578, 599, 600.*

"*These were all cases in which the issue of an injunction to a State court had been expressly or impliedly authorized by Congress as necessary to the effectual exercise by a Court of the United States of its lawful jurisdiction over particular persons or things.*"

In *Re Chetwood, 165 U. S., 443,* a State Court had assumed jurisdiction of an action to recover moneys alleged to be due a national bank in the hands of a receiver. The receiver was subsequently discharged, and the stockholders selected an agent in his place. The Circuit Court of the United States attempted to restrain the prosecution of the suit brought in the State Court. This was held not to be warranted, Mr. Chief Justice Fuller saying:

"The doctrine is firmly established that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court, and that where property is actually in the possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court of concurrent jurisdiction. Moran *v.* Sturgis, 154 U. S., 256, and cases cited. And by Section 720 of the Revised Statutes the granting of injunctions to stay proceedings in any court of a State is prohibited in express terms. It is unnecessary here to point out such exceptions or limitations as may exist. Obviously the Circuit Court could not restrain the prosecution of this suit in the State courts, and we are equally clear

that if Federal questions arose, the Circuit Court could not prevent this court, or a justice thereof, or the presiding judge of the State Court, from granting writs of error, *by restraining the parties from applying therefor;* nor could it properly direct their dismissal, having been granted."

THE RECOGNIZED EXCEPTIONS TO THE RULE.

There are thus two classes of cases which do not come within the purview of § 720:

1. Cases where injunctions are authorized by a law relating to proceedings in bankruptcy.

2. Cases in which the issuance of an injunction has been expressly or impliedly authorized by Congress as necessary to the effectual exercise by a Federal Court of its lawful jurisdiction over particular persons or things.

3. To these may be added as an additional class, those cases where a Federal Court and a State Court have concurrent jurisdiction, in which as a rule of necessity and comity it is held that the tribunal whose jurisdiction first attaches, holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved exhausted, in which case a Federal Court, if it has first acquired jurisdiction, may protect it by injunction.

Julian v. *Central Trust Company, 193 U. S., 93.*
Sharon v. *Terry, 36 Fed. Rep., 365.*
Moran v. *Sturges, 154 U. S., 256.*
In Re Chetwood, 165 U. S., 443.

THE RULE APPLIES TO PROCEEDINGS AFTER JUDGMENT.

That the rule of § 720 applies not only to proceedings before judgment, but also to proceedings after judgment, is apparent from the language of Mr. Justice Shiras in *Central National Bank v. Stevens, 169 U. S., 464*:

"But it has been frequently determined by this court that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until the judgment shall be satisfied. Thus it was said in *Riggs* v. *Johnson County, 6 Wall., 166*, that 'process subsequent to judgment, is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.' And in *Amy* v. *Supervisors, 11 Wall., 136*, it was said: 'The two sets of tribunals—state and national—are as independent as they are separate. Neither one can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgment and decrees.' 'An execution is the end of the law. It gives the successful party the fruits of his judgment.' *United States* v. *Nourse, 9 Pet., 8, 28.* But it is scarcely necessary to quote authorities to show that to deprive a court of the power to execute its decrees is to essentially impair its jurisdiction. *'Juris effectus in executione consistit.' Co. Litt., 289*"

See also *U. S.* v. *Parkhurst-Davis Mercantile Co., 176 U. S., 317, 320.*

THE NATURE OF THE FEDERAL SUIT.

Here, the Civil District Court of Louisiana, acting in accordance with the statutes of that State,

undertook to adjudicate with respect to the Petitioner's admitted cause of action against the Southern Railway Company, and to award to him a judgment for the damages to which he was entitled. After that court had proceeded to judgment in conformity with its practice, the Southern Railway Company, feeling aggrieved by the judgment rendered, instead of appealing therefrom or seeking to set it aside in the tribunal which had assumed jurisdiction, or of proceeding by an independent suit to procure a decree of nullity in the State court, invoked the jurisdiction of the Federal Court, for the sole and boldly avowed purpose of procuring an injunction to stay the Petitioner's proceeding in the State court, and from attempting to enforce the judgment which that court had rendered in his favor.

No other prayer for relief is contained in the bill. No other theory for equitable intervention is presented. The hands of the State court are sought to be bound; its power to act, to be subjected to the paralyzing agency of an injunction issued out of another tribunal, and the suitor who has resorted to it for relief, is incarcerated, because he has ventured to appeal to the State tribunal, which, acting within its powers, and in an orderly and presumably constitutional manner, had undertaken to afford to him the protection of the law.

The pretext by which the Federal Court has been asked to supersede the State Court is, that the Petitioner resorted to the courts of his own State, fraudulently claiming an excessive amount of compensation for injuries concededly inflicted by the negligence of the Southern Railway Company, and adducing testimony for the purpose of

establishing claims for damages which were fraudulent, fictitious and untrue, or, if true, of so remote and consequential a character as not to be recoverable, and that the complainant was prevented from availing itself of a meritorious defence (the nature of which is not stated), by the accident or failure of its not receiving from the Secretary of State of Louisiana, any citation or notice of the proceeding which had been instituted by the Petitioner.

These allegations, which are not supported by a single statement of fact, do not operate as a repeal of Section 720 of the United States Revised Statutes.

(*a*) *As to the Allegations of Fraud.*

The allegations are mere conclusions, a collection of epithets, and a series of *non sequiturs.*

Kent v. *Lake Superior Ship Canal Company, 144 U. S., 75, 91.*

A bill in chancery to set aside a judgment or decree of a court of competent jurisdiction on the ground of fraud, must state distinctly the particulars of the fraud, the names of the parties who were engaged in it, and the manner in which the court or the party was misled or imposed upon.

United States v. *Atherton, 102 U. S., 372.*
9 Encyclopedia Pl. & Pr., p. 684.
Brooks v. *O'Hara, 8 Fed. Rep., 532.*

A court of equity does not interfere with judgments at law, unless the complainant has an equi-

table defence of which he could not avail himself at law, or had a good defence at law which he was prevented from asserting by fraud or accident, unmixed with negligence on his part or that of his agents.

Knox County v. *Harshman, 133 U. S., 154.*
White v. *Crow, 110 U. S., 184.*
1 Black on Judgments, § 393.

In a bill to set aside a judgment for fraud, it is not sufficient to charge generally that the judgment was procured fraudulently, or that the court was imposed upon, but a state of facts must be disclosed from which the court can see that the conclusions stated by the pleader are properly and fairly drawn.

Travelers Association v. *Gilbert, 111 Fed. Rep., 269.*
16 Am. & Eng. Ency. L., 2nd Ed., 374.

The *gravamen* of the bill here is that because the Petitioner was willing to compromise at Five thousand dollars, therefore the presentation of a larger amount through the regular legal channels constituted fraud.

Neither this fact, nor the suggestion that the Petitioner's testimony was fraudulent or fictitious, is a sufficient ground for an independent suit in equity to set aside the judgment of the State court.

United States v. *Throckmorton, 98 U. S., 65, 69.*
Steele v. *Smelting Co., 106 U. S., 454.*

Kimberly v. *Arms, 40 Fed. Rep., 558.*
Kiko v. *Cohn, 91 Cal., 134.*
Andes v. *Millard, 70 Fed. Rep., 517.*
Mayor of New York v. *Brady, 115 N. Y., 615.*

Equally unfounded is the theory that the damages claimed were not legally allowable. The mere fact that a question might arise with respect to the rule of damages, as to which courts might differ, does not warrant the institution of a suit in one court to set aside a judgment obtained in another, founded in part on the application of a debatable rule of damage, or of evidence.

The petitioner's contention is however amply justified by so excellent an authority as *4 Sutherland on Damages (3d ed.) § 1246.*

It is also contended by the respondent that fraud is accentuated by the fact that the testimony presented by the petitioner on the trial in the District Court was not reduced to writing for the purpose of thereby preventing an appeal. This statement is without the slightest justification.

Under the laws of Louisiana, Art. 601, Code of Practice, it is optional with either party to the controversy "to take down the testimony in writing." The State Supreme Court has passed upon the question repeatedly. In the case of the *Succession of John T. Moore, La., 42 An., 335*, the court said, quoting from *Simmons v. Howard, 23 La. An., 504*: "We find no note of evidence in the record. In such a case we will presume the court *a quo*, in rendering judgment, proceeded on proper evidence. *Citizens' Bank v. Bringier, 22 An., 20; State v. Monsterio, 26 An., 634; Smith v. City of New Orleans, 24 An., 20; Succession of Pilcher, 39*

An., 362," and then adds: *"The parties were not required to have their evidence reduced to writing, or to see that a note is made of the evidence introduced."*

Again in *Rosenthal v. Rosenthal, 42 So. Rep., 270,* the court said: "The testimony adduced during the trial is not reduced to writing, unless at the request of one of the parties." *C. P., 601.*

Advised as respondent's present counsel was from an inspection of the record before the signature of the judge to the judgment, a statement of facts could have been required and the trial judge would have prepared his statement, finding the facts proved, so as to enable the appellate court to review the judgment based upon his findings; but no such requirement was made.

Art. 602, Code of Practice, provides: "When the deposition of witnesses have not been taken in writing in the inferior court, the party intending to appeal, or his advocate, must require the adverse party, or his advocate, to draw, jointly with him, a statement of the facts proved in the cause, and this statement thus drawn and signed, either by the parties or their advocates, shall be annexed to the records, and a transcript of the same transmitted to the Supreme Court."

Art. 603, Code of Practice, provides: "If the adverse party when required to do so, refuse to join in making out the statement of facts, or if the parties cannot agree as to the manner of drawing the same, the court, at the request of either, shall make such statement according to their recollection of the facts, or from the notes they have taken of the evidence."

Moreover the Civil District Court, after a thorough consideration of the evidence, and a consider-

ation of the witnesses expressly adjudged "that the demand of plaintiff [the petitioner] was proved" (Rec., p. 13).

(*b*) *As to the allegations of accident, based on the failure of the Railway Company to receive the citation from the Secretary of State.*

The Constitution and laws of Louisiana, require corporations doing business within the State, to designate an agent upon whom process intended for the corporation may be served, and in default of such designation, permit such process to be served on the Secretary of State.

The statute does not require the Secretary of State to hunt up the corporation, but it presumes that the corporation, when it undertakes to transact business within the State of Louisiana, consents that the Secretary of State shall be permitted to receive process intended for it, and that it will take the necessary steps to procure from the Secretary of State such process. There is no pretence that the Secretary of State did not perform his full duty; and it is to be presumed that he acted in good faith and in strict accordance with his duty.

It has been uniformly held in both Federal and State Courts that when a foreign corporation does business in a state whose laws authorize it to be sued therein by service of process upon one of its agents, or if no agent is designated, then upon a state official, its assent to such service will be implied.

In *Lafayette Insurance Company* v. *French, 18 How., 404,* which is the leading case on this subject, a corporation chartered by the State of In-

diana, was allowed by a law of Ohio to transact business in the latter State, on condition that service of process upon its agent should be considered as service upon the corporation itself. It was held that a judgment against the corporation, obtained by means of such process, was entitled to receive the same faith and credit in Indiana, to which it was entitled in Ohio; that the latter State had the right to impose such a condition upon all corporations transacting business within its boundaries, and that when a corporation undertook to carry on business in that State, it was presumed that it had assented to the condition.

This principle has been applied in numerous cases, especially in

Railroad Co. v. *Harris, 12 Wall., 65;*
Railroad Co. v. *Whilfor, 13 Wall., 270;*
Ex parte Schollenberger, 96 U. S., 375;
Pennoyer v. *Neff, 95 U. S., 375;*
New York, &c., Ry. Co. v. *Estill, 147 U. S., 608;*
Barrow Steamship Co. v. *Kane, 170 U. S., 109;*
Connecticut Mutual Life Ins. Co. v. *Spratley, 172 U. S., 613, and*
Mutual Reserve Assn. v. *Phelps, 190 U. S., 147.*
Pringle v. *Woolworth, 90 N. Y., 509;*
Foster v. *Traders' Mutual Life Ins. Co., 48 S. E. Rep. (N. C.), 667;*
State v. *St. Mary's Petroleum Co., 51 S. E. Rep. (W. Va.), 865.*

In *Pennoyer* v. *Neff* (*supra*), Mr. Justice Field said:

"Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association, or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State. As was said by the Court of Exchequer in *Vallee* v. *Dumergue*, 4 Exch., 290, 'It is not contrary to natural justice that a man who have agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.' See also *The Lafayette Insurance Co.* v. *French, et al.*, 18 How., 404, and *Gillespie* v. *Commercial Mutual Marine Insurance Co.*, 12 Gray (Mass.), 201. Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law. *Copin* v. *Adamson*, Law Rep., 9 Ex., 345."

In *Mutual Reserve Association* v. *Phelps, supra*, it was held, that under the statutes of Kentucky

the service of a summons upon an insurance commissioner in an action against an insurance company doing business in that State, was sufficient to bring the company into court, and that this statute applied to a company whose license had been cancelled, but which, notwithstanding that fact, had continued to collect premiums and assessments on policies remaining in force. The judgment based upon such service was declared to be valid in the absence of any other facts impeaching it. Mr. Justice Brewer, after referring to a decision of the Court of Appeals of Kentucky similar in effect, said:

"Such decision of the highest court of Kentucky construing one of its own statutes, if not controlling upon this court, is very persuasive, and it certainly is controlling unless it be held to be merely an interpretation of a contract created by the statute. As an original question, and independently of any expression on the part of the Court of Appeals, we are of the opinion that such is the true construction. This and other kindred statutes enacted in various States indicate the purpose of the State that foreign corporations engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek for the purpose of enforcing his claims the State in which the corporation has its home. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the State leaves the corporation without any person upon whom process can be served. In order to remedy this defect some States, Kentucky among the number, have passed statutes, like the one before us, providing that the

corporation shall consent that service may be made upon a permanent official of the State, so that the death, removal or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement of their claims. It is true in this case the association did not voluntarily withdraw from the State, but was in effect by the State prevented from engaging in any new business. * * * We conclude therefore, that the service of summons on the insurance commissioner was sufficient to bring the association into the State Court, and there being nothing else to impeach the judgment it must be considered as valid."

In *Pringle* v. *Woolworth* (*supra*), a judgment was held valid where a summons intended for a New York corporation was served upon the Insurance Commission of Pennsylvania, in accordance with a provision of the State law similar to that contained in the Louisiana statute, under which process intended for the Southern Railway Company was served on the Secretary of State.

In *Wilson* v. *Seligman, 144 U. S., 45,* the rule was stated as follows:

"It may be admitted that any State may by its laws require, as a condition precedent to the right of a corporation to be organized, or to transact business, within its territory, that it shall appoint an agent there on whom process may be served; or even that every stockholder in the corporation shall appoint an agent upon whom, or designate a domicile at which, service may be

made within the State, *and that, upon his failure to make such appointment or designation, the service may be made upon a certain public officer,* and that judgment rendered against the corporation after such service shall bind the stockholders, whether within or without the State. In such cases, the service is held binding because the corporation, or the stockholders, or both, as the case may be, must be taken to have consented that such service within the State shall be sufficient and binding; and no individual is bound by the proceedings who is not a stockholder. *Lafayette Ins. Co.* v. *French, 18 How., 404; Ex parte Schollenberger, 96 U. S., 369; Pennoyer* v. *Neff, 95 U. S., 714, 735; Vallee* v. *Dumergue, 4 Exch., 290, 303; Copin* v. *Adamson, L. R., 9 Exch., 345, 355, 356, and 1 Ex. D, 17.*"

To the same effect are:

Reyer v. *Odd Fellows' Frat. Assn., 157 Mass., 367.*
State vs. *St. Mary's Petroleum Co., 51 S. E. Rep., 865.*
Fisher vs. *Traders' Mut. L. Ins. Co., 48 S. E. Rep., 667.*
Van Dresser vs. *Oregon Ry. & Nav. Co., 48 Fed. 205.*
Stuart vs. *Harmon, 98 Fed., 192.*
American Cotton Co. vs. *Beasley, 116 Fed., 256.*

The Civil District Court, in this suit, expressly adjudged that this method of service was proper (Rec., pp. 10, 11). If this decision was erroneous, or if the act of 1904 permitting service on the Secretary of State was in violation of any provision of the Federal Constitution, the remedy for the correction of the error, was by appeal to the Su-

preme Court of Louisiana, and by writ of error directed by this court to that tribunal in the event of a decision adverse to the Southern Railway Company.

As to whether or not the Southern Railway Company was a foreign corporation "doing business" in the State of Louisiana, was a question of fact or a mixed question of law and fact, which the courts of that State were capable of determining and would presumptively decide, if called upon to do so.

> *Horn Silver Mining Company* vs. *New York, 143 U. S., 305.*
> *Shreveport* vs. *Cole, 129 U. S., 36.*
> *New Orleans* vs. *Benjamin, 153 U. S., 411, 424.*

At all events the decision of that question was primarily one for the determination of the courts of that State so long as the case remained in those courts, and the latter had undertaken to assume jurisdiction over it. They might have decided that question erroneously, and if, in so doing, they deprived the Southern Railway Company of its property without due process of law or otherwise violated the Federal Constitution, that company could have sought redress in this court, by pursuing the remedies afforded in such a case.

It is, however, another proposition, to declare that the Federal Court may, in a collateral proceeding, or by independent action, determine whether or not the State Court had jurisdiction, and restrain the latter from enforcing a judgment necessarily based on an adjudication by the State Court, that it was possessed of jurisdiction to pronounce such judgment.

It has been declared by this tribunal on a number of occasions that State Courts are competent to decide Federal questions arising before them; that it is their duty to pass on them when presented; and that it is to be presumed that they will meet the requirements of the Constitution and the laws of the United States. To this has been added the corollary that if error occurs, the remedy is to be found in § 709 of the Revised Statutes, and that the Federal Courts cannot be invoked to interfere in a controversy properly brought into a state court for decision, on the ground that the latter may so decide as to render its final action unconstitutional.

Defiance Water Co. vs. *Defiance, 191 U. S., 184.*
Arbuckle vs. *Blackburn, 191 U. S., 405.*

The cases relied upon by the respondent do not meet the question now to be determined.

In *St. Clair* v. *Cox, 106 U. S., 350,* a judgment *in personam* obtained in the State of Michigan in an attachment proceeding, was pleaded by way of set-off in an action brought in the Federal Court. The record in the action in which the judgment so pleaded was recovered, was objected to on the ground that the court rendering the judgment had not jurisdiction of the parties. It did not appear from the record so offered, that the corporation was doing business in the State at the time of the service of the writ on its agent, and it was therefore held that the court had no jurisdiction to render the judgment, and that, consequently, it could not be pleaded as a set-off.

In the present case, the record in the Petitioner's

action shows (*Rec., p. 6*) "that the Southern Railway Company [is] a corporation organized under the laws of Virginia, *and doing business in the City of New Orleans*", a fact overlooked by the respondent.

The doctrine of *Lafayette Insurance Co.* v. *French,* was, however, approved, in the case just cited, and it was merely held that where a right was sought to be based upon a judgment, the validity of the judgment could be properly litigated.

A similar question would arise if the petitioner should see to enforce the judgment obtained by him against the Southern Railway Company in another State, either by direct action on the judgment, or by pleading it as a set-off in an action brought against him.

It is not questioned, that if the conclusiveness of a judgment or decree of a court of one State is questioned in another court, Federal or State, it is a proper subject of inquiry as to whether or not the court rendering the judgment or decree had jurisdiction to render it; but that question does not now arise in the present case.

In *Goldey* v. *Morning News, 156 U. S., 518,* the action was originally brought in the Supreme Court of the State of New York, and the service was attempted to be made on the President of the corporation, who was a citizen and resident of Connecticut, while he was temporarily in New York. The action was removed into the Federal Court, and after removal, a motion was made to set aside the service of the summons, on the ground that the corporation did not carry on business in the State of New York, and had no agent or property within the State. The case came to this court on writ of error. There was no attempt

to enjoin the proceedings in the State Court, as in the present case, but resort was had to that form of procedure which enabled the parties to directly litigate in the action over which jurisdiction was sought to be obtained, the question of jurisdiction.

In *Conley v. Matheison Alkali Works, 190 U. S., 406*, the plaintiff brought his action in the Supreme Court of the State of New York. The summons was served upon a director of the defendant, a foreign corporation, who resided in New York. The corporation, however, was not doing any business in the State. Before the time to answer had expired, on defendant's motion the cause was removed to the Circuit Court, where a motion was made to set aside the summons and service as null and void. Affidavits were presented by both parties, and the court, passing upon the conflicting proofs, granted the motion. The case came here on writ of error from that adjudication.

In *Peterson v. Chicago, Rock Island and Pacific Ry. Co., 205 U. S., 364*, the case came to this court on writ of error to the Circuit Court of the United States for the District of Texas, where, on conflicting evidence, it was adjudged that the defendant was not doing business in the State of Texas, and that, therefore, service of process on employees or agents of another corporation whose stock was practically owned by the defendant company, did not confer jurisdiction. There, after an elaborate trial, based on documentary and other evidence, and on the facts as disclosed, it was adjudged by the court upon which jurisdiction was sought to be conferred, that it did not possess jurisdiction.

Here, if the respondent had gone into the State Court, and had there presented proofs indicating that it was not doing business in the State of

Louisiana, and that question had been passed upon by that court, a similar situation would have been presented.

In *Green v. Chicago, Burlington & Quincy Ry. Co., 205 U. S., 530,* the action was brought in the Circuit Court for the Eastern District of Pennsylvania, where the defendant appeared specially for the purpose of disputing jurisdiction, claiming that it was not doing business within the district, and that service on an agent of the defendant, who transacted even the incidental business of solicitation of trade and passenger traffic in Pennsylvania, did not confer jurisdiction. The validity of the service depended upon whether, or not, the corporation was doing business within the district in such manner and to such an extent as to warrant the inference that through its agents it was present there. It was held that it was not, and in affirming the judgment on the facts presented, Mr. Justice Moody said:

"The question here is whether service upon the agent was sufficient, and one element of its sufficiency is whether the facts show that the defendant corporation was doing business within the district. It is obvious that the defendant was doing there a considerable business of a certain kind, although there was no carriage of freight or passengers. In support of his contention that the defendant was doing business within the district in such a sense that it was liable to service there, the plaintiff cites Denver &c. Railroad Co. *v.* Roller, 100 Fed. Rep., 738, and Fuchband *v.* Chicago &c. Railroad Co., 115 N. Y., 437. The facts in those cases were similar to those in the present. *But in both cases the action was brought in the State courts, and the question was of the interpretation of a State statute and the jurisdiction of the State courts.*"

So, here, the petitioner brought his suit in the State Court on an allegation that the Southern Railway Company was doing business in New Orleans, which of course means in the state of Louisiana (Rec., p. 6). The question that has arisen, is as to the interpretation of a State Statute, and the jurisdiction of the State Court. The latter has interpreted the statute as conferring jurisdiction on facts which are to be presumed to have been sufficient to enable it to pass judgment thereon; but if insufficient, the defendant's remedy was by appeal and writ of error, and not by injunction in the Federal Court to restrain the enforcement of the judgment obtained in the State Court.

The petitioner has not undertaken to litigate in the Federal Court, the question of jurisdiction, believing that he would be called upon to litigate that question in the first instance in the State Court.

We are not now called upon to determine whether or not the Southern Railway Company was "doing business" in the State of Louisiana at the time when the process was served upon the Secretary of State in the petitioner's action against it, although the petition on which the action is based, so alleged. The proofs on that subject have not been taken, and for the purposes of the present proceeding it suffices to say, that the petitioner is prepared, on the proper occasion, to demonstrate that the Southern Railway Company was so engaged. The Southern Railway Company could have moved in the State Court to set aside the service of process, or it might have removed the case into the Federal Court, and have moved in that tribunal; but it has not chosen to pursue that natural remedy, but in the face and eyes of *Section 720 of the United*

States Revised Statutes, it has sought to enjoin the petitioner from proceeding in the State Court in an action over which the latter had, presumptively, jurisdiction, and in which that court, in conformity with its regular practise, had assumed to render judgment.

See

Barrow Steamship Co. v. Kane, 170 U. S., 100.

At all events an independent action to set aside the decree for nullity, especially in a case arising in Louisiana, was not the proper remedy. It was so adjudged in *Barrow* v. *Hunton, 99 U. S., 80.*

There, A having recovered a judgment against B and C in the District Court for the Parish of New Orleans, B, on the ground among others that the judgment, having been obtained by default and without lawful service upon him, was void, filed a petition in that court praying for a decree of nullity and for an injunction. An injunction and citation were issued and served upon A, who thereupon, alleging that he was a citizen of Missouri and B a citizen of Louisiana, prayed that the action of nullity be removed to the United States Circuit Court. It having been so removed, and B's petition amended by converting it into a bill so as to conform to the practice in equity, that court, on a final hearing, dissolved the injunction and dismissed the bill. It was held, that the causes relied on for nullity of the judgment being, under the Code of Louisiana, as well as under principles of general jurisprudence, vices of form, the proceeding by petition was substantially a continuation of the original suit, and that the Circuit

Court could not take cognizance thereof. Mr. Justice Bradley said:

"The question presented with regard to the jurisdiction of the Circuit Court is, whether the proceeding to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States Court could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different states. Such a result would be totally inadmissible.

"On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in *Gaines v. Fuentes, 92 U. S., 10,* the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the State courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof.

"It would seem apparent that the proceeding in the present case was one that affected the mere regularity of the original judgment. In the com-

mon law practice, it would have been a motion to set aside the judgment for irregularity, or a writ of error *coram vobis.*"

The provisions of the Code of Practice of Louisiana are then referred to, and it is shown that Article 606 specifies the vices of form for which a judgment can be annulled; as, when against a minor appearing without a curator, or against a married woman appearing without the authority of her husband; *where the defendant is condemned by default without being cited;* where the judge was incompetent to try the suit; and *where defendant has not been legally cited, and has not entered appearance, and judgment is by default.*

It is urged that the Southern Railway Company was not doing business in the State of Louisiana, and for that reason did not come within the provisions of the act of 1904. The State court, whether erroneously or not, decided that it was so engaged, and the correctness of that decision could only be tested by appeal or writ of error from the State court, and not by an action to enjoin the enforcement of the judgment, instituted in the Federal Court.

AUTHORITIES RELIED ON BY RESPONDENT.

The right to grant the injunction restraining the Petitioner's proceedings in the State court is sought to be sustained by Judge Parlange and Saunders, on the authority of *Terre Haute & I. R. Co. v. Peoria & P. U. R. Co., 82 Fed. Rep., 943, National Surety Co. v. State Bank, 120 Fed. Rep., 593,* and *Massie v. Buck, 128 Fed. Rep., 27,* all of which proceed upon a curious misconception of the case of *Marshall v. Holmes, 141 U. S., 589,*

which Judge Grosscup, in the first of the cases cited, erroneously stated to be an action "begun originally in the Federal court" (*82 Fed. Rep., p. 946*).

This misunderstanding apparently originated from a hasty glance at the headlines immediately below the title of the case: "Error to the Court of Appeals for the Second Circuit *of the State of Louisiana.*" The words italicized were apparently overlooked, and the case was treated as though it had come to this court from the United States Circuit Court of Appeals for the Second Circuit; whereas, it in fact was brought here, on a writ of error directed to an inferior appellate tribunal of the State of Louisiana.

A more careful consideration of that case shows these facts: Mrs. Marshall, a citizen of New York, filed a petition for injunction in the Eighth District Court for the Parish of Madison, Louisiana, representing that one David Mayer had recently obtained in a suit *in that court* a judgment against her for the sum of $127.50, on false testimony and forged documents, and under circumstances, indicating fraud in the concoction of the judgment, which could not have been known by her at the time of the trial, and which had been discovered since the rendition of judgment and since the lapse of the legal delays within which a motion could be made for a new trial. She asked that an injunction against Mayer, the judgment creditor, and Holmes, the Sheriff of the Parish, restraining them from executing the judgment, should be granted; that the judgments be annulled and avoided, and that she have general and equitable relief. *A writ of injunction was issued as prayed for, by the State Court.* Thereafter Mrs. Marshall filed a petition

for the removal of her suit into the Circuit Court of the United States, upon the ground of diversity of citizenship of the parties. *The court made an order refusing the application for removal* and proceeded with the trial of the case, rendering judgment for the defendants dissolving the injunction, and authorizing Mayer to execute his judgment.

The only question for determination by this court, related to the removability of the suit from the State to the Federal Court, and it having been held that the case involved the jurisdictional amount of $500, exclusive of costs, and that it did not come within the rule of *Barrow v. Hunton, supra,* the cause was removable from the State court and should have been remanded to the Eighth District Court for the Parish of Madison, with directions to set aside all orders made after the filing of the petition and bond for removal of the suit into the Circuit Court of the United States, and to proceed no further, Mr. Justice Harlan saying:

"It was not, however, for the State court to disregard the right of removal upon the ground simply that the averments of the petition were insufficient or too vague to justify a court of equity in granting the relief asked. The suit being, in its general nature, one of which the Circuit Court of the United States could rightfully take cognizance, it was for that court, after the cause was docketed there, and upon final hearing, to determine whether, under the allegations and proof, a case was made which, according to the established principles of equity, entitled Mrs. Marshall to protection against the judgments alleged to have been fraudulently obtained."

That is an entirely different proposition from that which is presented in the present case—as to whether or not the Federal court had the right to grant an injunction restraining the proceedings in the State court.

It is true that in the course of his opinion, Mr. Justice Harlan said:

"While it cannot require the State court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a State court. It would simply take from him the benefit of judgments obtained by fraud."

These remarks are purely *obiter*, and the decision reached does not depend upon their correctness. Prior to the filing of the removal proceedings an injunction had been granted by the State court, and on the removal that injunction would have continued in force.

So far as the paragraph now cited is to be construed as declaring that Section 720 of the United States Revised Statutes is not applicable, because an injunction would operate directly upon the judgment creditor and not upon the State court, it is in direct conflict with *Peck* v. *Jenness* (*7 How., 612, 624*), *Moran* v. *Sturges, supra, In re Chetwood, supra; Central National Bank* v. *Stevens* (*supra*), and a host of other authorities to which these cases refer, and also *Yick Wo* v. *Crowley, 26 Fed., 209; Wagner* v. *Drake, 31 Fed.*,

851; Dillon v. *Kansas, etc., R. Co., 43 Fed., 111;* and *Whitney* v. *Wilder, 54 Fed., 555.*

It has already been shown that in *Terre Haute & I. R. Co.* v. *Peoria R. Co., 82 Fed. Rep., 943,* Judge Grosscup misconceived the history of *Marshall* v. *Holmes.* It is further contended that that learned Judge did not carefully study the opinion, for he says:

"The injunction was issued in aid of the main purpose of the suit, restraining the judgment creditors from issuing an execution upon such judgment pending the final decree."

The only injunction that was issued in that case, was issued by the State court; while the injunction in the present case was issued by the Federal court.

So, in *National Surety Company* v. *State Bank, 120 Fed. Rep., 593,* Judge Sanborn, citing *Marshall* v. *Holmes, supra,* said:

"Section 720 forbids the Federal courts from staying the proceedings of the State courts, but it does not grant to litigants of whom the Federal courts have jurisdiction unlimited license to use the unconscionable judgments of the State court to inflict irremediable injury upon the defendants. An injunction, as in Leathe *v.* Thomas, 97 Fed. Rep., 138, which restrains a sheriff—an officer of the State court—from executing the judgment of that court, is a plain violation of the Federal statute, because it stays the proceedings of the State court, and it cannot be sustained. *But an injunction which forbids the plaintiff in such a judgment from making an inequitable use of it acts upon him—upon his person only.* It forbids him from perpetrating a wrong, but it neither restrains nor stays the proceedings of the State court or of its officer, and it does not fall under

the ban of the section of the statute under consideration."

The authorities above referred to indicate that this is not only a misconception of *Marshall v. Holmes*, but utterly ignores the long line of cases which have just been adverted to, in which the courts have held that an injunction against a party to a proceeding in a State court, is such a stay of proceedings as is sought to be prohibited by Section 720.

In *Massie v. Buck, 128 Fed. Rep., 27*, an injunction was granted which merely restrained a defendant from selling, incumbering or in any way disposing of lands purchased at a sheriff's sale. Consequently it did not refer to proceedings in a State court, but to the disposition of property acquired after the completion of the last step in the litigation in the State court.

On that theory, it might be said that the injunction did not violate Section 720, but Judge Shelby evidently based his decision upon a wrong reason, for he said, citing the cases already referred to:

"A Federal court, in a proper case, has jurisdiction to cancel titles made by authority of a decree of a State court, and this statute (Section 720) does not deprive a Federal court of jurisdiction to enjoin proceedings in a State court when such injunctive remedy is ancillary to granting relief in a case of which the Federal court has jurisdiction."

Other decisions relied upon in the cases just referred to may be briefly distinguished from the present.

Dietzsch v. *Huidekoper, 103 U. S., 494,* was one in which the plaintiff removed into the proper Circuit Court of the United States a suit in replevin brought in a State court. At the instant of removal, all the incidents and processes primarily issued by the State Court were transferred to the Federal Court. When the latter acted, therefore, it was upon its own records. The State Court was ousted of jurisdiction; there was nothing before it as to which judicial action could be taken, and, consequently, Section 720 of the Revised Statutes was in no manner involved.

Johnson v. *Waters, 111 U. S., 640,* was a creditor's bill filed in a Circuit Court of the United States, wherein it was sought to set aside a sale of real estate of a deceased person made under the orders of a State Probate Court, on the ground of fraud. The bill was maintained and the judgment of the State Court was successfully impeached on the ground stated, and the effect of the decree was to subject the property thus fraudulently acquired to the payment of the creditor's claim. No injunction was asked for or granted by the Federal Court to stay any proceedings in the State Court. The sole purpose of the suit was to reach the fruits of the fraudulent decree after it had been fully carried into effect, and not to enjoin any proceedings in the State Court.

Arrowsmith v. *Gleason, 129 U. S., 86,* was a bill filed to set aside a sale of an infant's land fraudulently made by his guardian under authority derived from a Probate Court. There no injunction was asked for or granted. The decree of the State Court had been followed by a sale. There were no proceedings to be enjoined. It was merely at-

tempted to set at naught a judgment fraudulently obtained.

Cole v. *Cunningham, 133 U. S., 107,* was an action brought in the Supreme Judicial Court for the County of Suffolk, Massachusetts, to restrain the defendants, who were citizens of that State, from bringing suits in the Supreme Court of the State of New York for the purpose of obtaining a preference over other creditors of an insolvent citizen and inhabitant of Massachusetts. It was held that it was no violation of the full faith and credit clause of the Constitution, for the equity courts of one State to control persons within their jurisdiction from prosecuting suits in another State. There was no question in that case of an attempt on the part of the Federal Court to enjoin proceedings in a State Court, and Section 720 was in no manner involved.

ADDITIONAL CASES IN SUPPORT OF OUR CONTENTION.

Among them are the following:

Nougue v. *Clapp, 101 U. S., 551,* arose on a bill filed in a Federal Court, charging that proceedings had been instituted and a summary order of sale obtained in a State Court as a result of a fraudulent conspiracy, by which the plaintiff was deprived of his property. There was no application for injunctive relief. Upon demurrer to the bill, it was dismissed; and upon appeal to this court, Mr. Justice Miller said:

"We think that for this court, after all this has been done, to undertake to decree that what that

court did is void, to sit in review on its judgment, and reverse its decree and set aside its sale, in a case where its jurisdiction is undoubted, is unwarranted by the relations which subsist between the two courts. It would be an invasion of the powers belonging to that court, and such a doctrine would, upon the simple allegation of fraud practised in the court, enable a party to retry in the Federal Court any case decided against him in a State Court."

See also *Mutual Reserve Assn.* v. *Phelps, 190 U. S., 147.*

In *Hemsley* v. *Meyers, 45 Fed. Rep., 283,* Judge Caldwell, said, referring to Section 720:

"This section (720), save the exception, is as old as the judicial system of the United States. Its prohibition is absolute and unqualified, except where the injunction is authorized by law in proceedings in bankruptcy. This exception serves to emphasize the prohibition as to all other cases. In cases where the jurisdiction of the court of the United States first attaches, the statute has no application; but in the cases we are considering the jurisdiction of the State courts first attached, and that fact, independently of the statute, according to a well-settled rule, is a bar to the jurisdiction of this court. To the observance of the rule enunciated by this section and other cognate rules we are indebted for the almost uniform harmonious relations that have existed between the State and the United States courts, from the foundation of the government down to the present time. The rule would probably have been the same independently of the statute. The State courts observe the rules towards the courts of the United States upon principle, and without any statute requiring them to do so. It is not merely a rule of comity, but an absolute rule of law, obligatory on the courts of both jurisdictions, and absolutely essential to the maintenance of harmonious relations

between the State and the United States courts, and indispensable to the due and orderly administration of justice in both. Appeals may be taken in certain cases from the State courts to the Supreme Court of the United States, and in this way suitors claiming a right or privilege under the constitution of the United States, or an act of Congress, or a treaty, may have the validity of their claim finally determined by the Supreme Court of the United States; but the district and circuit courts of the United States possess no appellate or supervisory jurisdiction over the State courts. The circuit courts of the United States and the State courts are each destitute of all power, either to restrain or review the process or proceedings in the other. This rule has had the approval of the courts, lawyers, legislators, and laymen from the beginning of our system of government. The rule commends itself to the common sense of all mankind, and there can be no higher evidence of the soundness of a rule of law than that there is a universal concensus of opinion that it is sensible and just."

In *Aultman & Taylor Co.* v. *Brumfield, 102 Fed., 14-15,* the Court said:

"A repeal or modification of section 720 should not be lightly presumed. To preserve harmony and comity between the courts of the United States and those of the state, it is essential that it shall be observed in its spirit as well as in its letter. Under the act of 1875, as amended by the act of August 13, 1888, the circuit courts of the United States are given original jurisdiction, 'concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, * * * arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority.' So, any suit of which original jurisdiction is given may be removed by the defendant from a state court to the circuit court of the United States.

"But it is well settled that, although the decision of a case pending in a state court may depend upon the construction and application of the constitution of the United States, the suit is not removable by the defendant unless the federal question appears on the face of the plaintiff's pleadings. If it does not so appear from the plaintiff's statement of his own claim, the want cannot be supplied by any pleadings filed by the defendant. Chappell *v.* Waterworth, 155 U. S., 102, 15 Sup. Ct., 34, 39, L. Ed. 85; Tennessee *v.* Union & Planters' Bank, 152 U. S., 454, 14 Sup. Ct., 654, 38 L. Ed., 511; Galveston, H. & S. A. R. Co. *v.* Texas, 170 U. S., 26, 78 Sup. Ct., 603, 42 L. Ed., 1017.

"The remedy of a defendant in a suit in which the decision must turn upon the construction or application of the constitution of the United States, where the federal question is not disclosed by the plaintiff's statement of the case, is to present the question by his pleadings, and, if the right thus set up under the constitution or laws of the United States is denied to him by the highest court of the state to which the controversy can be carried, he may sue out a writ of error from the Supreme Court of the United States, and thus obtain a review of the decision of the state court upon the federal question directly involved. It would be strange, indeed, if a defendant to an action in a state court, whose defense involved the construction and application of the constitution of the United States, but who could not remove the suit because the federal question did not appear upon the face of the plaintiff's statement of his claim, should have the right to transfer the case to a court of the United States by an *independent injunction bill*, whereby the state court should be deprived of jurisdiction, and the decision of the same question drawn into the United States Court. The provisions for a *review by writ of error* afford to the complainant ample means for obtaining redress, if in fact it has been subjected to the deprivation of rights secured to it by the

provisions of the fourteenth amendment. The conclusion we reach is that this court can grant no efficient or practical relief without it can enjoin the pending suit in the state court and draw to itself the decision of all the questions involved by the defense which can be there presented. This we cannot do without violating the plain terms of section 720. The injunction heretofore granted must be dissolved, and the bill dismissed for want of equitable jurisdiction, but without prejudice to the right of complainant on the merits of the case."

The principle involved in this matter is of transcendent importance. The integrity of our judicial system is at stake. Thus far in our dual governmental system there has been a remarkable freedom from direct conflict between the Federal and State judicial tribunals. That gratifying condition is due, in large measure, to the wisdom of the founders of our government, who, in its earliest days, foresaw the dangers which would flow from attempts on the part of the Federal courts to enjoin proceedings in State courts, and forbade such interference by act of Congress; and the principle of this legislation was applied by this Court at an early period, to nullify the attempts of the State courts to enjoin proceedings in the Federal tribunals.

It comes, therefore, with something of a shock to find that a Federal court has granted an injunction restraining judicial proceedings in a State court, where the suit is brought for no other purpose than to secure such injunction, where the bill of complaint contains no other prayer for relief than that of the restraint of the proceedings in the State court, and where the record does not

even disclose the slightest reason for the granting of such extraordinary relief and negatives the possibility that it is sought to preserve and safeguard the priority of jurisdiction of the Federal court.

III.

It is respectfully submitted that the petition for writs of habeas corpus and certiorari be granted, and the petitioner discharged from custody.

HENRY L. LAZARUS,
Petitioner's Solicitor.

LOUIS MARSHALL,
Of Counsel.

Supreme Court of the United States

October Term, 1907.

No. 13, Original.

EX PARTE, IN RE EPHRAIM SIMON,

Praying for Writ of Habeas Corpus.

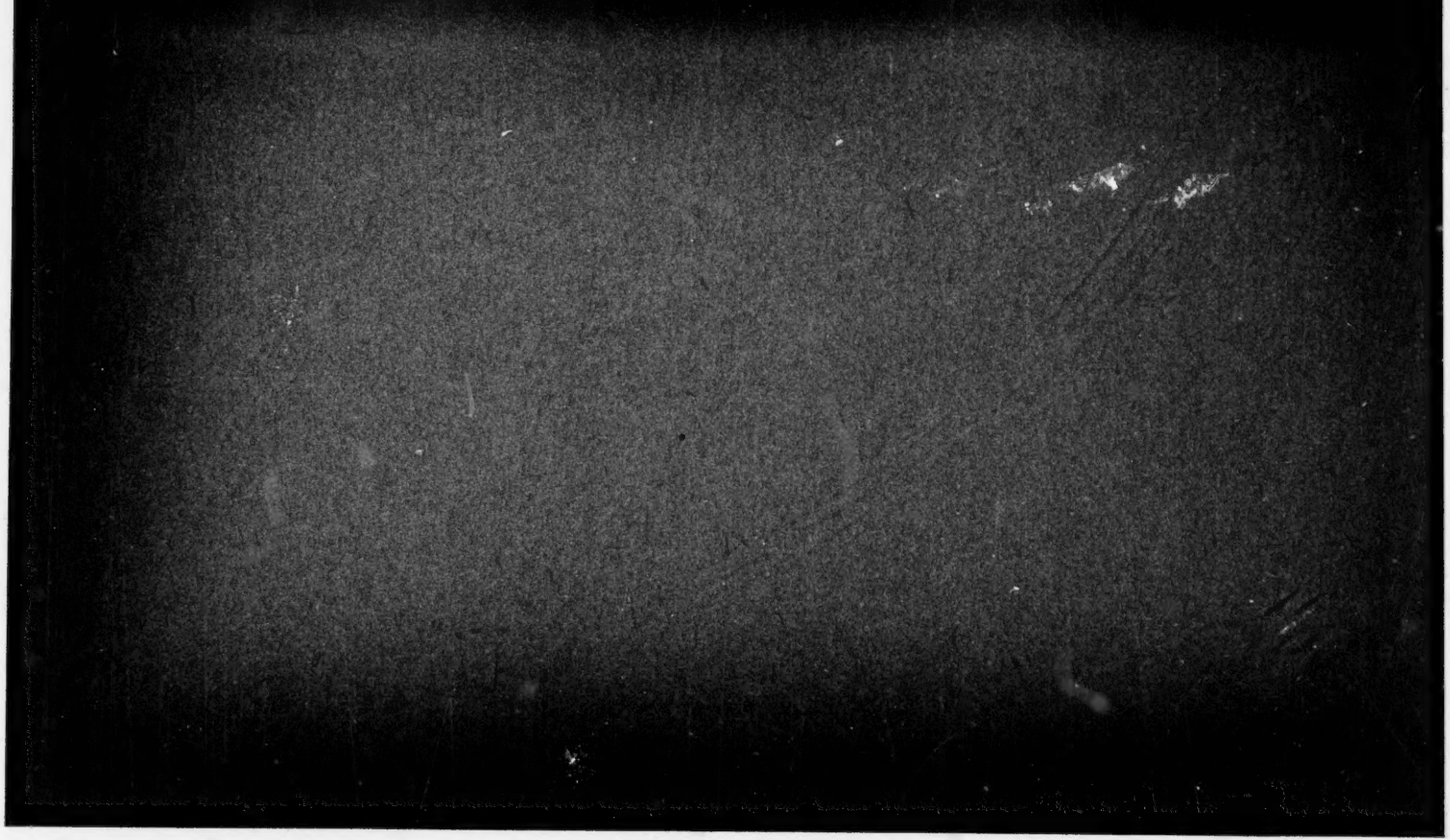
Brief in Opposition to Application.

HARRY H. HALL,

Solicitor and Counsel for the Southern Railway and Appearing for the United States Marshal.

December, 1907.

J. B. Hanna, "The Legal Printer," 630-32 Poydras Street, N. O.



Supreme Court of the United States

OCTOBER TERM, 1907.

No. 13, ORIGINAL.

EX PARTE, IN RE EPHRAIM SIMON,

PRAYING FOR WRIT OF HABEAS CORPUS.

BRIEF IN OPPOSITION TO APPLICATION.

The following facts are shown by this record:

February 8, 1904, Ephraim Simon, while a passenger on one of the trains of the Southern Railway, near the Town of York, Ala., sustained, in a collision (Tr., p. 7), personal injury which required his family surgeon's "skill and attention for upwards of two months (Tr., p. 38). "His ankles were badly swollen, due, apparently, to a concussion received through the soles of his feet, and, while it was severe and obviously painful, the tissues of his feet and ankles and legs were not lacerated, nor were the tendons thereof in any manner ruptured"; nor was the injury of a permanent character (Tr., p. 45).

March 3, 1904, he had returned to his store, where, seated on a chair, he was personally conducting and directing his business of clothing manufacturer (Tr., pp. 46, 49).

April 4, 1904, the law agent of the Southern Railway Company, accompanied by a surgeon, called at Simon's place of business for the purpose of adjusting his claim for damages. They were referred to Simon's lawyer, **Mr. Lazarus**, to whom they offered in settlement the sum of $750. Mr. Lazarus declined this offer, but "made a proposition to me for a settlement of the claim of Simon for the sum of $5,000," which proposition was rejected (Tr., pp. 48, 25).

December 1, 1904, Simon filed suit, by his aforesaid counsel, in the Civil District Court for the Parish of Orleans, State of Louisiana, against the Southern Railway Company, alleging its indebtedness to him of $13,348 damages claimed to have resulted from the injury aforesaid, of February 8, 1904. He alleged that, "in consequence of the collision, your petitioner's ankles were severely sprained, and the ligaments of his legs lacerated and torn, so as to prevent the use of his limbs in locomotion, and compelling his carriage from place to place, until there had been a partial restoration, enabling petitioner to move on crutches," etc. (Tr., p. 9). He alleged that, by reason of his said injury, he was prevented from completing the journey which he had undertaken for the purpose of soliciting trade orders. He "had customers awaiting his arrival, from whom petitioner

would, as he believes, have secured orders, and an opportunity to solicit orders from others than his regular customers," and was likewise unable to give his personal supervision and direction to the manufacture of his raw material into articles of wearing apparel (Tr., p. 7). He alleges that his claim for damages was composed of the following items:

Physical and mental anguish	$ 5,000
Profit from business "which he had reason to believe he would have received"	4,000
Deterioration of raw material, resulting from failure to manufacture it into articles for which he might have obtained orders but for his injury	3,000
Cost of manufacturing stock because of lack of his personal supervision	1,000
Nurses, medicines, etc.	250
Physician's services	98
	$13,348

Tr., pp. 8, 9, 10.

He prayed for service of citation on the Secretary of State and for trial by jury (Tr., p. 10).

December 3, 1904, citation and petition were served on the Assistant Secretary of State at Baton Rouge, La. (Tr., p. 11). This citation and petition were not mailed to the Southern Railway Company, with its 7,000 miles of trackage, nor delivered to any representative of that system, but were filed away in the office of the Secretary of State "the said company having failed to designate any agent upon whom service of process can be made, as

required by law'' (Tr., p. 14).

Act 54 of 1904, General Assembly of Louisiana, enacts that it shall be the duty of every foreign corporation **''doing any business in this State,''** to file in the office of the Secretary of State a written declaration setting forth its domicile, where it is doing business in Louisiana, and the name of an agent upon whom process may be served; and it is therein provided that, whenever any such corporation shall do any business in this State without having complied with these requirements, service of process against it may be validly made on the Secretary of State.

January 10, 1905, a default was entered in the Civil District Court against the Southern Railway Company, and, on **January 16, 1905,** a jury was impaneled, and that default was confirmed, in the absence of defendant and without notice of the suit to it, or knowledge by it thereof. A verdict was given and judgment was rendered, as claimed, by Judge Sommerville, for $13,348 (Tr., pp. 12, 13).

January 17, 1905, Mr. H. H. Hall, a member of the bar and one of the directors representing the Southern Railway Company's holdings of the capital stock of the New Orleans Terminal Company, saw in the morning newspapers of that day a notice of the rendition of this judgment, and when, immediately, he went to the division of the Civil District Court presided over by Judge Sommerville, for the purpose of examining the minute entries,

that Judge called him up and inquired if he represented, as its counsel, the Southern Railway Company, and was informed that he did not, and that said company was not represented in New Orleans by any counsel or by any agent, and this information was given to said judge, January 17, 1905, before the signing of said judgment (Tr., pp. 51, 52).

Mr. Hall, on the same day, wrote to the assistant general counsel of the Southern Railway Company, Col. W. A. Henderson, apprising him of the fact of the rendition of the said judgment, and shortly thereafter Col. Henderson came to New Orleans and retained the professional services of Mr. Hall to file a bill in the Federal Court to obtain relief in the premises (Tr., p. 52).

It was, and is, unusual, if not unheard of, for a judgment of this kind to be rendered without the testimony being reduced to writing; and, after the enactment of the Statute No. 110 of 1902 of the General Assembly of Louisiana, amending Article 213 of the Code of Practice, there was no necessity for submitting the issue to a jury rather than to the Court. No evidence was placed of record, and there was nothing upon which to base an appeal (Tr., p. 54).

The Southern Railway Company did not, at the time of this suit, transact or do, nor has it since transacted or done, any business whatsoever in the State of Louisiana. It did not then operate, nor has it since operated, any trains, nor had, nor has it, any line of railway therein.

All tickets sold in this State for transportation over the lines of the Southern Railway, by the ticket agent in New Orleans, are furnished by the Louisville and Nashville Railroad Company, and none of the lines of the Southern Railway are reached at a nearer point to New Orleans than the City of Atlanta, Ga. All freight and passengers originating on its lines are brought into New Orleans over either the New Orleans and Northeastern or the Louisville and Nashville railroads, both owned by independent and distinct corporations (Tr., pp. 51, 52, 53).

Nor is it averred in Simon's petition that the Southern Railway Company does any business in the State of Louisiana.

February 6, 1905, the Southern Railway Company filed its bill of complaint in the United States Circuit Court, Eastern District of Louisiana, No. 13,300 of the docket, being the proceeding now under consideration (Tr., p. 1).

The **bill** recites:

> "Ephraim Simon is a citizen of Louisiana and a resident in the Eastern District of that State. The Southern Railway is a corporation organized and domiciled in the State of Virginia, and, for purposes of litigation in the Federal Courts, it is a citizen of Virginia.
>
> "The Southern Railway Company owns and operates lines of railway in the States of Virginia and Mississippi and other States, but neither owns nor operates any railroad in the State of Louisiana. It is empowered to operate a line of railway in Virginia and other States, but **not** in the State of Louisiana."

It is averred in the bill of complaint that, on **February 8, 1904**, the said Simon, while a passenger on one of the trains of the Southern Railway Company, was slightly injured near York, in the State of Alabama; that, after sustaining this injury, said Simon sued the Southern Railway Company, for damages resulting from said accident, in the Civil District Court for the Parish of Orleans, in the suit entitled **Ephraim Simon vs. Southern Railway Company**, No. 74,869 of the docket of said Court, and that, in said suit, he recovered a judgment of $13,348 for damages which he falsely and fraudulently pretended he had suffered by reason of the said collision. The items of this judgment were as follows:

Physical and mental anguish	$ 5,000
For loss of profit in business which he believes he would have received but for his injury	4,000
For deterioration of stock	3,000
For extra cost of manufacturing stock	1,000
For nurses, medicines, etc.	250
For physician's services	98
	13,348

The bill alleges that, in the above suit, the defendant, the Southern Railway Company, was not cited through any officer or agent appointed by that company, and that the only citation attempted to be made upon it was a citation isssued and served on the Assistant Secretary of the State of Louisiana, on December 3, 1903:

> "Said Simon maintaining that your orator was a foreign corporation doing business in the State of

> Louisiana, which had not filed in the office of the Secretary of State a written declaration setting forth the locality of its domicile and the place or places in this State where it is doing business, and had failed to name an agent upon whom process might be served, and claiming that, by reason thereof and by virtue of Act No. 54 of 1904 of the Acts of the General Assembly of the State of Louisiana, he was, in such case, and by reason of such omission, justified in serving said citation on the said Secretary of State."

The bill avers that the Southern Railway Company is not a foreign corporation doing business in the State of Louisiana, and that none of its lines of railway enter or traverse any part of said State. Accordingly, it is further averred that

> "the attempted service of said citation upon the Secretary or Assistant Secretary of State of Louisiana was not a citation upon your orator, and is absolutely null and void for the purpose of bringing it under the jurisdiction of the said Civil District Court."

The bill also recites:

> "Your orator avers that it has never received from the Secretary of State the above-referred-to citation, issued out of said suit No. 74,869 of the Civil District Court for the Parish of Orleans, nor was it advised, nor had it any knowledge, of the pendency of said proceedings until after the rendition of said judgment."

After thus attempting to cite the Southern Railway Company, Simon entered a default in the suit above men-

tioned on January 10, 1905, and, on January 16, 1905, he proceeded to confirm said default.

The bill avers that,

> "in confirming the said default, the said Ephraim Simon was guilty of subterfuge and fraud in claiming, and adducing testimony to the effect, that he had sustained damages in the sum of $13,348, as above stated."

And the bill avers that

> "the verdict of the jury and the judgment of the Civil District Court, as above set out, are **unconscionable as having been rendered fraudulently and upon false testimony, and without due and proper citation** or notice to your orator, and that it would be against good conscience to allow said judgment to be used to extort money that is not owing from your orator, which has no remedy at law in the premises, and which has a complete, meritorious defense to the claim on which the said judgment is based."

The bill then avers that, as soon as the Southern Railway Company learned of the rendition of judgment against it in the above-mentioned suit, its assistant general counsel left the City of Washington and immediately proceeded to the City of New Orleans to investigate the matter, and thereupon promptly retained counsel to bring this bill of complaint.

It is also asserted:

> "Your orator avers that it was prevented from availing itself of its defense to the cause of action em-

bodied in said proceeding by the accident or failure of its not receiving from said Secretary of State any citation or notice of said proceeding, and that it has been without negligence, either of itself or its agents, in the premises.

"Your orator avers that this Court has plenary jurisdiction to restrain the enforcement of such judgment, to which your orator has a meritorious defense, which it was prevented, by fraud and accident, unmixed with its own negligence, from adducing.

"Your orator avers that, unless prevented and restrained, the said Ephraim Simon will attempt to collect said fraudulent judgment, and will cause to be issued thereon, out of the Civil District Court, a writ of *fieri facias*, under and by virtue of which he will attempt to seize your orator's property and thereby cause it continuous and irreparable injury."

The prayer is for a writ of injunction restraining the said Ephraim Simon from proceeding against the Southern Railway Company under the said suit and judgment, or from issuing execution thereon, or attempting thereunder to seize any property, movable or immovable, of the Southern Railway Company, or in any manner attempting to enforce the same (Tr., p. 1).

The foregoing bill was filed on **February 6, 1905**, and, on the same day, a restraining order was issued against the defendant, who entered his appearance in the case on April 3, 1905. He had already, on February 25, 1905, demurred to the bill on the grounds, first, that the bill presented no case for equitable relief; second, that the Federal Court was without jurisdiction,

"inasmuch as the complainant seeks, through the process of this Court, **to review a judgment of the State Court and to control, by its process, the proceedings of said State Court** with reference to a final judgment rendered therein" (Tr., p. 18).

This demurrer was overruled (Tr., p. 72), and, on **June 9, 1905,** a preliminary injunction issued (Tr., p. 70). Thereafter, on February 5, 1907, the defendant filed a plea in which it reiterated, at length, the grounds of the demurrer (Tr., p. 73). The complainant filed a replication to this plea on **April 19, 1907** (Tr., p. 76), and the plea, having been submitted on the face of the papers by both parties, was overruled (Tr., p. 77). Thereafter, on August 5, 1907, Simon filed his answer herein, and in this answer reserved the benefit of his demurrer and plea. He further pleaded the judgment of the State Court as *res adjudicata* of the issues raised in this bill. **August 19, 1907,** replication was filed (Tr., pp. 77, 83).

After filing his answer, the defendant decided to disregard the preliminary injunction—he had never appealed—and, accordingly, on **November 8, 1907,** he caused execution to issue under the State judgment above mentioned (Tr., pp. 87, 91). On **November 11, 1907,** counsel for the Southern Railway Company filed a rule in the Federal Court to punish Simon for his contempt in disregarding the injunction by issuing execution on the State judgment above mentioned (Tr., p. 84). This rule was tried and decided on November 15, 1907, and, on the

trial of the rule, the lower Court adjudged Simon guilty of contempt and orderd him to be imprisoned (Tr., p. 100).

I.

The decision of the present controversy turns upon the determination of the question whether the Circuit Court for the Eastern District of Louisiana, New Orleans Division, had jurisdiction to entertain and decide the suit in equity between the Southern Railway Company and Ephraim Simon.

If the lower Court had jurisdiction over that controversy, then the *habeas corpus* in this case must be denied. If the lower Court did not have jurisdiction over that controversy, then it had no jurisdiction to punish Simon for contempt of its injunction, and the *habeas corpus* will be granted.

In **Ex Parte Yarbrough, Petitioner, 110 U. S. 651,** it was held:

> "This Court has no general authority to review, on error or appeal, the judgment of Circuit Courts in cases within their criminal jurisdiction. When a prisoner is held under sentence of a Court of the United States in a matter wholly beyond the jurisdiction of that Court, it is within the authority of the Supreme Court, when the matter is properly brought to its attention, to inquire into it, and to discharge the prisoner if it be found that the matter is not within the jurisdiction of the Court below."

In **In Re Frederich, Petitioner, 149 U. S. 76,** it was held:

> "The only ground on which this Court, or any Court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another Court, is the want of jurisdiction in such Court over the person or the cause, or some other matter rendering its proceedings void."

In **Ex Parte Terry, 128 U. S. 302,** it was held:

> "Nor can there be any dispute as to the power of a Circuit Court of the United States to punish contempt of its authority" (302).
>
> "The contention of his counsel is that the Circuit Court failed to take such steps as were necessary to give jurisdiction of the person of the prisoner at the time the order was made committing him to jail for contempt; and, therefore, that the order was illegal and the writ should be awarded. If this position is sound, the conclusion stated would necessarily follow; for, while the writ may not be used to correct mere errors or irregularities, however flagrant, committed within the sphere of the authority of the Court, it is an appropriate writ to obtain the discharge of one imprisoned under the order of a Court of the United States which does not possess jurisdiction of the person or of the subject-matter" (305).

Therefore, it is well settled that, where a Court is without jurisdiction to entertain the main suit in which an injunction issues, disobedience of such injunction is not a contempt of Court, and cannot be punished as such. Accordingly, the confinement of Simon, if the lower Court had no jurisdiction, would be illegal, and he would be

entitled to be released by *habeas corpus*. On the other hand, it is just as firmly settled that, where the Court has jurisdiction of the main suit in which an injunction issues, the enjoined defendant is not permitted to disregard the injunction on the ground that it was issued erroneously. He is bound to obey the injunction until a higher Court reverses the action of the Court of first instance in issuing it.

Let us, then, see if the Federal Court had jurisdiction over the main suit.

II.

The judgment of the State Court is an absolute nullity for want of citation.

The bill avers, and the affidavits prove, that the Southern Railway did not, and does not, transact any business of any nature whatever in the State of Louisiana, nor does it operate any line of railroad therein. Tickets are sold, and freight sent over other railroads leading out of this State and connecting with the Southern Railway in other States, but it only transacts business in connection therewith when it receives passengers and freight from said connecting lines.

In **Peterson vs. Chicago St. Ry., 205 U. S. 390,** it was held:

> "It is settled by the decisions of this Court that foreign corporations can be served with process within the State only when doing business therein,

and such service must be upon the agent who represents the corporation in its business. (*St. Clair vs. Cox*, 106 U. S. 350; *Golden vs. Morning News*, 156 U. S. 518, 521. *Conley vs. Mathieson*, 190 U. S. 406.)"

In **Green vs. Chicago St. Ry., 205 U. S. 530**, it was held:

"A railroad company which has no tracks within the district is not doing business therein, in the sense that liability for service is incurred, because it hires an office and employs an agent for the merely incidental business of solicitation of freight and passenger traffic. (147 Fed. Rep., affirmed.)"

In **St. Clair vs. Cox, 106 U. S. 350**, it was held:

"The Courts of the United States do not regard as valid, or as importing verity, a judgment *in personam*, rendered by a State Court, for the recovery of a debt or demand, unless the defendant either entered a voluntary appearance, or he, or someone authorized to receive process for him, was personally cited to appear. (*Pennoyer vs. Neff*, 95 U. S. 714, cited and approved), and the doctrine announced in that case declared to be applicable to personal judgments against corporations."

In **Pennoyer vs. Neff, 95 U. S. 727**, this Court, in determining the effect of constructive service of Court process, held:

"Where the entire object of the action is to determine the personal rights and obligations of the defendants—that is, where the suit is merely *in personam*—constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into an-

other State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and proceedings published within it, are equally unavailing in proceedings to establish his personal liability."

"If, without personal service, judgments *in personam* obtained, *ex parte*, against non-residents and absent parties upon mere publication of a process which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression" (726).

It is elementary that, if a judgment is rendered without citation of the defendant, and without his voluntary appearance in court, it is absolutely void.

"No judgment of a Court is due process of law if rendered without jurisdiction in the Court, or without notice to the party."

Scott vs. McNeal, 154 U. S. 34.

III.

The judgment of the State Court is fraudulent, and is attacked for fraud.

The judgment attacked gives $13,348 for an injury, slight and not permanent, for which Simon's counsel, duly authorized to speak for him, offered to accept $5,000, and which was not worth $750.

The item alllowed in said judgment, of $4,000 for alleged profits on business which Simon **"had reason to believe he would have secured"** but for his injury, was so remote and impossible of proof that no honest judicial investigation could have allowed; and so of the allowance of $3,000 for goods unmanufactured because of Simon's having been unable to secure orders for the same if they had been manufactured. And so of the allowance of $1,000, increased cost of manufacture, for want of Simon's personal supervision, when, as a matter of proven fact, that supervision was had. It was fraud to take a judgment by default for $7,000 which the litigant must be presumed to know was without warrant of law, and that fraud was accentuated by *ex industria* departing from the customary form, and not reducing such illegal testimony to writing, with the obvious purpose of thereby preventing an appeal.

IV.

The United States Circuit Court has jurisdiction of a suit between the parties in interest, citizens of different States, claiming that the judgment obtained by one against the other in a State Court is null for want of citation.

That is, it may determine, as between the Southern Railway Company and Simon, whether the judgment of the State Court was, or was not, absolutely void for want of jurisdiction in that Court. The issue presented is not

whether complainant has the right to control or direct proceedings being carried on in a State Court properly seized of jurisdiction, and to arrogate to itself the power to determine those live issues. But the issue raised is whether the Federal Courts, vested with jurisdiction by reason of diverse citizenship, has the right and power to sit in judgment upon the terminated act of the State Court and decide whether or not that action is null and void in so far as it concerns the parties thereto.

In the present case, as the parties are citizens of different States, any controversy whatever that may arise between them is subject to the jurisdiction of a proper Federal Court if the parties invoke that jurisdiction.

The Southern Railway Company seeks to enjoin Simon from in any manner interfering with its property. Simon comes in and asserts the existence of a right in him, under an alleged judgment of the State Court, to seize and sell complainant's property.

Both in his answer in this case and in his answer to the rule for contempt Simon asserts that his judgment was valid, because it was rendered by a Court of competent jurisdiction *ratione materiae et ratione personae*. He thus squarely tenders the issue of the jurisdiction of the Court which rendered the judgment upon which he relies as a justification for disregarding the injunction.

The authorities in support of this proposition are so numerous and uniform that the question should not be considered open to discussion.

In **Marine Insurance Company of Alexandria vs. Hodgson, 7 Cranch,** the Court said:

> "Without attempting to draw any precise line to which Courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a Court of Chancery."

In **Williamson vs. Berry, 8 Howard, 543,** the Court held:

> "The operation of every judgment depends upon the jurisdiction of the Court to render it. Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceeded in the judgment. And, whenever the right to property is claimed to have been changed under a judgment or decree by a Court, and it is set up as a defense in another court, the jurisdiction of the former may be inquired into. The rule is that, where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal."

In **Hyde vs. Stone, 20 How. 170,** the Supreme Court say (p. 175):

> "But this Court has repeatedly decided that the jurisdiction of the Courts of the United States over controversies between citizens of different States

cannot be impaired by the laws of the States which prescribe the modes of redress in their Courts or which regulate the distribution of their judicial power. In many cases, State laws form a rule of decision for the Courts of the United States, and the forms of proceedings in these Courts have been assimilated to those of States, either by legislative enactment or by their own rule. But the Courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of other jurisdictions."

In **Payne vs. Hook, 7 Wallace, 429**, the Court held:

"The jurisdiction of the Circuit Court for Missouri to hear this cause is denied, because, in that State, exclusive jurisdiction over all disputes concerning the duties or accounts of administrators until final settlement is given to the local County Court, which is the Court of Probate; and, as the administration complained of is still in progress in the County Court of Calloway County, resort must be had to that Court to correct the errors and frauds in the accounts of the administrator.

"The theory of the position is this: That a Federal Court of Chancery, sitting in Missouri, will not enforce demands against an administrator or executor if the Court of the State, having general chancery powers, could not enforce similar demands. In other words, as the complainant, were she a citizen of Missouri, could obtain a redress of her grievances only through the local Court of Probate, she has no better or different right because she happens to be a citizen of Virginia.

"If this position could be maintained, an important part of the jurisdiction conferred on the Fed-

eral Courts by the Constitution and laws of Congress would be abrogated. As the citizen of one State has the constitutional right to sue a citizen of another State in the Courts of the United States, instead of resorting to a State tribunal, of what value would that right be if the Court in which the suit is instituted could not proceed to judgment and afford a suitable measure of redress? The right would be worth nothing to the party entitled to its enjoyment, as it could not produce any beneficial results. But this objection to the jurisdiction of the Federal tribunals has been heretofore presented to this Court, and overruled. We have repeatedly held 'that the jurisdiction of the Courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their Courts, or which regulate the distribution of their judicial power.' If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their Courts, it is not so with equitable. The equity jurisdiction conferred upon the Federal Court is the same that the High Court of Chancery in England possesses—is subject to neither intimidation nor restraint by State legislation, and is uniform throughout the different States of the Union" (p. 430).

In **Galpin vs. Page, 18 Wallace, 364, 366 and 367,** it was held:

"The defendant relies upon the validity of the decree of the District Court, notwithstanding a subsequent reversal, to uphold the Commissioner's sale and deed. Her position is this: That the District Court of a State was a Court of general jurisdiction; that, being such, it is presumed to have had jurisdic-

tion both of the subject-matter and persons which authorized the rendition of the decree in question; that such presumption is conclusive, and the validity of the decree cannot be collaterally attacked by any matter outside of the record, and that, therefore, the sale made under the decree before it was reversed is not affected by the reversal. * * *

"But the presumptions which the law implies in support of the judgments of superior Courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. * * *

"The presumptions indulged in support of the judgments of superior Courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits—persons who can be reached by their process—and also over proceedings which are in accordance with the course of the common law.

"The tribunals of one State have no jurisdiction over the persons of other States, unless found within their territorial limits. They cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation, without any binding efficacy.

" 'The authority of every judicial tribunal, and the obligation to obey,' says Barge in his Commentaries, 'are circumscribed by the limits of the territory in which it is established.' 'No sov-

ereignty,' says Story in his Conflict of Laws, 'can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals.' "

Thompson vs. Whitman, 18 Wallace, 457, held:

"Neither the constitutional provision—that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State—nor the Act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered" (p. 457).

"Chancellor Kent expresses the same doctrine in nearly the same words, in a note to his Commentaries. 'The doctrine in *Mills vs. Duryee*,' says he, 'is to be taken with the qualification that, in all instances, the jurisdiction of the Court rendering the judgment may be inquired into, and the plea of *nil debet* will allow the defendant to show that the Court had no jurisdiction over his person. It is only when the jurisdiction of the Court in another State is not impeached, either as to the subject-matter or the person, that the record of the judgment is entitled to full faith and credit. The Court must have had jurisdiction, not only of the cause, but of the parties, and, in that case, the judgment is final and conclusive' " (p. 463).

In **Gaines vs. Fuentes et al., 92 U. S. 10,** it was held:

"A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is, in essential particulars,

a suit in equity; and if, by the law obtaining in a State, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the Circuit Court of the United States, if the parties are citizens of different States."

In **Arrowsmith vs. Gleason, 129 U. S. 98,** the Court held:

"But it is insisted that the Circuit Court of the United States, sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for—namely, a decree setting aside and vacating the orders of the Probate Court of Defiance County. If by this is meant only that the Circuit Court cannot by its orders act directly upon the Probate Court, or that the Circuit Court cannot compel or require the Probate Court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmening, in his lifetime, or of his heirs since his death, to hold these lands as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction upon the ground of fraud. If the case made by the bill is clearly established by proof it may be assumed that some State Court of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But, whether that be so or not, it is difficult to perceive why the Circuit Court is not bound to give relief according to the recognized rules of equity as administered in the Courts of the United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs, being in excess of the amount required for the original jurisdiction of such Courts."

In **Old Wayne Life Ass'n vs. McDonough, 204 U. S. 15,** it was held:

> "The plaintiff in error insists that the Pennsylvania Court had no jurisdiction to proceed against it; consequently, the judgment rendered was void for the want of the due process of law required by the Fourteenth Amendment. If the defendant had no such actual, legal notice of the Pennsylvania suit as would bring it into court, or if it did not voluntarily appear therein by an authorized representative, then the Pennsylvania Court was without jurisdiction, and the conclusion just stated would follow, even if the judgment would be deemed conclusive in the courts of that Commonwealth. The constitutional requirement, that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, is necessarily to be interpreted in connection with other provisions of the Constitution, and, therefore, no State can obtain, in the tribunals of other jurisdictions, full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law. 'No judgment of a Court is due process of law if rendered without jurisdiction in the Court, or without notice to the party.' (*Scott vs. McNeal*, 154 U. S. 34, 46.) No State can, by any tribunal or representative, render nugatory a provision of the supreme law. And, if the conclusiveness of a judgment or decree in a Court of one State is questioned in a Court of another government, Federal or State, it is open, under proper averments, to inquire whether the Court rendering the decree or judgment had jurisdiction to render it. Such is the settled doctrine of this Court" (p. 15).

V.

The United States Circuit Court has jurisdiction in a suit between the parties in interest, citizens of different States, claiming that the judgment obtained by one against the other is voidable for fraud practiced in obtaining it.

In **Johnson vs. Waters, 111 U. S. 667,** the Court held:

> "The administration of General Morgan's succession undoubtedly properly belonged to the Probate Court of the Parish of Carroll, and, in a general sense, it is true that the decisions of that Court, in the matter of the succession, are conclusive and binding, especially upon those who are parties. But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of the fraud. The Court of Chancery is always open to hear complaints against it, whether committed *in pais* or in or by means of judicial proceedings. In such cases, the Court does not act as a Court of review, nor does it inquire into any irregularities or errors of proceeding in another Court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it" (p. 667).
>
> "Had the question of fraud been before the Probate Court in any of these proceedings, and had the complainant been apprised of them, the case might have

been different. This Court would not try over again a case already tried, nor permit the complainant to litigate matters which he had notice of, and which he had no opportunity to litigate in the probate proceedings. But one of the grounds of complaint made by the bill is that the very attorneys whom he had employed to secure his claim acted as attorneys of the succession and heirs, and conducted the proceedings for the sale, and participated as active parties therein, without giving him any notice of what was being done" (p. 669).

In **Cole vs. Cunningham, 133 U. S. 112,** this Court, referring to the constitutional provision that full faith and credit should be given in each State to the public acts, records and judicial proceedings of every other State, said:

"This does not prevent an inquiry into the jurisdiction of the Court, in which a judgment is rendered, to pronounce its judgment, nor with the right of the State to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in, and impeachable for, a manifest fraud."

In **Marshall vs. Holmes, 141 U. S. 596,** the Court held:

"While, as a general rule, a defense cannot be set up in equity which has been fully and fairly tried at law, and although, in view of the large powers now exercised by courts of law over their judgments, a Court of the United States, sitting in equity, will not assume to control such judgments for the purpose simply of giving a new trial, it is a settled doctrine that any fact which clearly proves it to be against conscience to execute a

judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." (Citing 7 Cranch, 332, 336; 17 Howard, 443, 445; 94 U. S. 652, 653; 104 U. S. 93, 96; 107 U. S. 3, 11; 133 U. S. 152, 154; 98 U. S. 61, 65.)

"But it is contended that it was not competent for the Circuit Court of the United States, by any form of decree, to deprive Mayer of the benefit of the judgments at law, and that Mrs. Marshall could obtain the relief asked only in the court in which the judgments at law were rendered. It is true that a Circuit Court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may not, in any case, deprive a party of the benefit of a judgment fraudulently obtained by him in a State Court, the circumstances being such as will authorize relief by the Federal Court, if the judgment has been rendered by it and not by a State Court? * * * This Court held that the jurisdiction of the Circuit Court depended upon the question whether the action to annul the judgment was or was not in its nature a separate suit, or only a supplementary proceeding so connected with the original suit as to form an incident to it, and to be substantially a continuation of it. * * *

"It said: 'If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, it would belong to the latter category, and the United States Courts could not properly entertain jurisdiction of the case.

Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings of the State Courts, or would have appellate jurisdiction over them in a case where the parties are citizens of different States. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill of equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in *Gaines vs. Fuentes*, 92 U. S. 10, the case might be within the jurisdiction of the Federal Courts. The distinction between the two classes of cases might be somewhat nice, but it may be affirmed to exist.' * * *

"Referring to the provisions of the Louisiana Code of Practice authorizing an action to annul a judgment obtained through fraud, forgery, the forging of documents, etc., the Court said that it was not disposed to allow the fact that, by the local law, an action of nullity could only be brought in the court rendering the judgment, or in the court to which the judgment was taken by appeal, to operate so far as to make it an invariable criterion of the want of jurisdiction in the Courts of the United States.

"'If,' the Court said, 'the State Legislatures could, by investing certain Courts with exclusive jurisdiction over certain subjects, deprive the Federal Courts of all jurisdiction, they might seriously interfere with the right of a citizen to resort to those Courts.' * * *

"These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is, none the less, an original, independent suit, because it relates to judgments obtained in the courts of another jurisdiction. While it cannot require the State Court itself

to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a Court of the United States from granting a writ of injunction to stay proceedings in a State Court. It would simply take from him the benefit of judgments obtained by fraud" (p. 596).

In **Terre Haute & I. R. Co. vs. Peoria & P. U. R. Co., 82 Federal Reporter, 945,** the Court held:

"The Constitution of the United States (Art. 3, par. 2) provides that the judicial power of the Courts of the United States shall extend to all cases in law and in equity arising under the Constitution, the laws of the United States, treaties or between citizens of different States. The statutes of the United States have, ever since the original judiciary act, provided that the Circuit Court shall have original cognizance, concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity arising under the Constitution or laws of the United States, or in which there shall be controversies between citizens of different States. Injunctions to restrain proceedings in a State Court are frequently as incident to a case to which the constitutional and statutory power of the United States Courts is thus extended. An action, for instance, to annul a judgment at law obtained by fraud is a distinct case in equity, and can, therefore, be brought within the jurisdiction of the Federal Circuit Courts if proper diversity of citizenship exists," etc. (p. 945).

In **National Surety Co. of New York et al. vs. State Bank, etc., 120 Federal Reporter, 593 et seq.**, the Court held:

> "The gravamen of this bill, however, is not that there was no service of the summons in the action at law. It is that, in that action, a judgment which ought not, in equity and good conscience, to be paid, has been rendered against the Surety Company, when it had a perfect right to the action, of which it was prevented from availing itself, by accident or mistake, without fault or negligence on its part. It is conceded that the judgment was regularly and legally rendered after due service of the summons. Yet the fact remains that it is a judgment without cause, which the appellants ought not to be required to pay, and which they were prevented from defending themselves against by the failure of John F. Cornell, the Auditor of Public Accounts of the State of Nebraska, to send them the summons, as the statute directed" (p. 596).
>
> "We have, then, an unconscionable judgment at law for seven thousand eight hundred and forty-two dollars and forty cents ($7,842.40), in favor of a citizen of Nebraska, to which the appellants, citizens of New York and Missouri, respectively, had a good defense, which they were prevented, by unavoidable accident, unmixed with fault or negligence on their part, from availing themselves of. The appellees are about to enforce this judgment. Has the Federal Court, sitting in equity, the jurisdiction to prevent them from so doing? Fraud, accident and mistake are three great heads of equity jurisprudence; and, whenever injustice or wrong, irremediable at law, is about to result from either, power is vested in, and the duty is imposed upon, the courts of equity to prevent the threatened injury. Their jurisdiction

rests upon the fact that, unless they act, wrong will be perpetrated which cannot be remedied; and the bills exhibited to them are appeals to the consciences of the Chancellors to prevent injustice. Counsel for the appellees concede that the Federal Courts have equitable jurisdiction to enjoin the enforcement of unconscionable judgments at law which have been procured by fraud; but they insist that they are without power to restrain the collection of those which are secured by accident or mistake. But the foundation of equity jurisdiction is the wrong that will be perpetrated if the court of equity does not act. Accident and mistake are as well-established grounds for the action of a court of equity as fraud. It is as unjust—as abhorrent to the conscience of the Chancellor—that one who does not owe a judgment which has been secured against him by accident should be compelled to pay it, as it is that he should be compelled to pay one procured by fraud. The injury is the same in each case. Both cases fall under equally well-recognized heads of equity jurisdiction. Both appeal with equal force to the conscience of the Chancellor, and the conclusion is irresistible that each is entitled to command the same measure of equitable relief. The Federal Courts, sitting in equity, have the same power to prevent the enforcement of unjust judgments at law, procured by accident or mistake, that they have to prevent the collection of those obtained by fraud. They have plenary jurisdiction to restrain the enforcement of judgments and decrees to which the defendants have meritorious defenses that they were prevented from interposing, either by fraud or accident or mistake, unmixed with their own negligence" (p. 598).

"This brief review of the cases cited by appellees will suffice to show what their careful reading will demonstrate—that they contain no decision that the

Federal Circuit Court may not lawfully enjoin the enforcement of an unconscionable judgment or decree of a State Court based upon an unfounded claim, which the defendant was prevented, by unavoidable accident, from defeating. More than this; they evidence this indubitable principle, which has now become so firmly established by repeated decisions of the Supreme Court, that it is no longer debatable: A Federal Circuit Court, sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment of a State or of a National Court for new causes, such as fraud, accident or mistake, which prevented the judgment defendants from availing themselves of a meritorious defense that was not fairly presented to the Court which rendered the judgment. But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the Courts which rendered the judgment or decree. The reason of this rule is that cases of the former class present new controversies, which have never been raised in other courts, of which the Federal Courts cannot escape jurisdiction if they arise between citizens of different States and involve the requisite amount" (p. 600).

"The Constitution of the United States and the Acts of Congress have conferred upon the Federal Circuit Courts the jurisdiction to hear and determine controversies between citizens of different States in which the matter in dispute exceeds $2,000 in value. This suit presents such a controversy. It is a new controversy, which has never been presented to or decided by the State Court which rendered the judgment, the enforcement of which the complainants seek to prevent. It involves the question whether or not the appellants were prevented, by unavoidable accident, from availing themselves of a good defense

to the claim on which that judgment is based, and, if so, whether or not the judgment plaintiff should be permitted to collect the judgment. The Circuit Court of the United States has jurisdiction of this controversy, and the appellants have the legal rights to a hearing and decision of the questions which it presents, and to the relief which the decision of those questions entitles them. That Court may not lawfully renounce that jurisdiction. It cannot rightfully deny to the appellalnts the right to the decision, decree and writ to which they show themselves entitled. It is not the judgment of the State Court against which these appellants leveled the injunction they seek. It is against the plaintiff in that judgment. It is against the unconscionable use by that plaintiff of the judgment which he has recovered to perpetrate an unconscionable wrong. The basis of the suit is the threatened use of this judgment to extort from the appellants money which they ought not to be required to pay, and the Federal Circuit Court is vested with the same power and charged with the same duty to enjoin the appellees from perpetrating this extortion by means of an unconscionable judgment of a State Court that it is to prevent them from effecting it by the use of such a judgment of a National Court, by means of a fraudulent patent, deed, mortgage or by the use of any other instrument or device against which they have no remedy at law. The extortion of $7,842 from the appellants by the use of this judgment of the State Court will inflict upon them as grievous an injury as would its extortion by a like judgment of a National Court, and the Circuit Court of the United States has the same preventive power, and the appellants are entitled to the same measure of relief from it, in the one case as in the other. The decisions of the Supreme Court which have been cited, however, have so conclusively dis-

posed of this question that more extended discussion would be unprofitable; and we leave it with this brief statement of the reasons which have induced, and which amply sustain, the rule that the Circuit Courts of the United States have the same jurisdiction and power to enjoin a judgment-plaintiff from enforcing an unconscionable judgment of a State Court, which has been procured by fraud, accident or mistake, that they have to restrain him from collecting a like judgment of a Federal Court" (p. 602).

VI.

The Federal Court is not bound by the interpretation of State statutes by the State Court.

Counsel for Simon contend that "the Civil District Court, in this suit, expressly adjudged that this method of service was proper. If this decision was erroneous * * * the remedy for the correction of the error was by appeal to the Supreme Court of Louisiana." By this is meant that, had the Court not considered the service good, it, presumably, would not have rendered the judgment.

But the law is otherwise.

In **Rose vs. Himely, 4 Cranch, 268**, the Court said:

> "The great question to be decided is: Was this sentence pronounced by a Court of competent jurisdiction?
>
> "At the threshold of this interesting inquiry a difficulty presents itself which is of no inconsiderable magnitude. It is this: Can this Court examine the jurisdiction of a foreign tribunal? The Court pronouncing the sentence, of necessity, decided in favor

of its jurisdiction; and, if the decision was erroneous, that error, it is said, ought to be corrected by the superior tribunal of its own country, not by those of a foreign country.

"This proposition certainly cannot be admitted in its full extent. A sentence, professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever.

"The power of the Court, then, is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether a sentence has changed the right of property."

In **Cole vs. Cunningham, 133 U. S. 112**, this Court, referring to the constitutional provision that full faith and credit should be given in each State to the public acts, records and judicial proceedings of every other State, said:

"This does not prevent an inquiry into the jurisdiction of the Court, in which a judgment is rendered, to pronounce its judgment, nor with the right of the State to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in, and impeachable for, a manifest fraud."

In **Scott vs. McNeal, 154 U. S. 45**, it was held:

"Upon a writ of error to review the judgment of a higher Court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this Court is no more bound by that Court's construction of a statute of a Territory, or of the State, when the question is

whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case, this Court must decide for itself the two constructions of the statute. (*Huntington vs. Attrill*, 146 U. S. 657, 683, 684; *Mobile & Ohio R. R. vs. Tennessee*, 153 U. S. 486, 492, 495.)

"No judgment of a Court is due process of law if rendered without jurisdiction in the Court, or without notice to the party" (p. 46).

VII.

The Circuit Court, having jurisdiction, may restrain by injunction all proceedings tending to impair that jurisdiction.

In **Julian vs. Central Trust Company, 193 U. S. 93**, this Court held:

"Where the Federal Court acts in aid of its own jurisdiction, and to render its decree effectual, it may, notwithstanding Paragraph 720, Revised Statutes, restrain all proceedings in a State Court which have the effect of defeating or impairing its jurisdiction."

In **Terre Haute vs. Peoria, etc., 82 Fed. Rep. 943**, the Circuit Court for the Northern District of Illinois held:

"Revised Statutes, Paragraph 720, which declare that Federal Courts shall not, by injunction, stay

proceedings in State Courts except in bankruptcy matters, do not deprive a Federal Court from jurisdiction to enjoin proceedings in a State Court as ancillary to granting relief in a case in which the Federal Court has jurisdiction."

VIII.

REPLY TO PETITIONER'S BRIEF.

In view of what would appear by the foregoing authorities to be the well-settled jurisprudence of this Court, it might seem unnecessary to reply to petitioner's brief.

At page 12 of counsel's brief he cites certain decisions of this Court in support of his contention that the United States Circuit Court has not the power to restrain, by injunction, proceedings of State tribunals.

Counsel fails to distinguish between an attempt to stay pending proceedings of a Court vested with jurisdiction of the parties and subject-matter, and a proceeding brought to enjoin a defendant from attempting to execute a judgment obtained by fraud, without citation or notice to his defendant.

Thus, **Haines vs. Carpenter, 91 U. S. 254; Dial vs. Reynolds, 96 U. S. 340; Sargent vs. Helton, 115 U. S. 348; Moran vs. Sturges, 154 U. S. 267,** are suits wherein complainants ask to enjoin the defendants from further proceeding with suits actually pending in the State Courts against defendants duly cited, said Court being fully seized of jurisdiction.

In **Ex Parte Fiske, 113 U. S. 713,** it was held that the

lower Court had exceeded its authority in punishing for contempt, for refusal to submit to an examination which the Court had ordered, without authority or warrant of law.

In **Julian vs. Central Trust Company, 193 U. S. 93,** the syllabus reads:

> "Where the Federal Court acts in aid of its own jurisdiction, and, to render its decree effectual, it may, notwithstanding Section 720 of the Revised Statutes, restrain all proceedings in a State Court which have the effect of defeating or impairing its jurisdiction."

In **Moran vs. Sturges, 154 U. S. 256,** it was held that Courts, for the purpose of protecting their jurisdiction, may enjoin parties amenable to their process from interference with respect of property in their possession, in identical controversies therein pending in other courts of concurrent jurisdiction.

In **In Re Chetwood, 165 U. S. 443,** the Court held:

> "Where the jurisdiction of a Court, and the right of the plaintiff to prosecute his suit in it, have once attached, the right cannot be arrested or taken away by proceedings in another court."

In **Central National Bank vs. Stevens, 169 U. S. 464,** the Court held:

> "The two sets of tribunals—State and National—are as independent as they are separate. Neither can impede or arrest any action the other may take, *within the limits of its jurisdiction,*" etc. (p. 465). (My italics.)

In **Nougue vs. Clapp, 101 U. S. 551,** it was held:

> "The Circuit Court of the United States cannot review or set aside the final decree rendered by a State Court *which has complete jurisdiction of the parties and the subject-matter.*" (My italics.)

There was, in this case, a charge of fraudulent conspiracy, concerning which the Court said:

> "So, also, by these rules, the charge of a fraudulent combination to cheat the complainant required that the plea should have been accompanied by an answer denying the fraud under oath. The plea may, therefore, be considered as out of the case" (p. 552).

It is urged that the Southern Railway Company, if aggrieved by the judgment rendered in the State Court, should have appealed therefrom. But the defendant, by his devices, rendered an appeal impossible. Nor does the right of appeal preclude recourse to the Federal Court. It is further suggested that the Railway Company might have brought a suit in the State Court to annul that judgment.

It undoubtedly could have done so; but, by reason of diverse citizenship, it had the same right to bring in the Federal Court any suit which it might have brought in the State Court.

Counsel urges that the hands of the State Court are sought to be bound, and its power to act subjected to the paralyzing agency of an injunction issued out of another tribunal, and the suitor, who has resorted to it for relief,

incapacitated, because he has ventured to apply to the State tribunal.

This is a strange inference to draw from a suit brought by a citizen of one State against the citizen of another, to enjoin the latter from attempting to execute a judgment obtained fraudulently and without citation or due process of law.

Neither the State nor the State Court is concerned in the proposition. No injunction is asked against the Court or any of its officers.

I therefore submit that petitioner is not entitled to the relief prayed for, and that his application for the writ of *habeas corpus* should be denied.

Respectfully submitted,

HARRY H. HALL,

Solicitor and Counsel for the Southern Railway and Appearing for the United States Marshal.

December, 1907.

Ex parte SIMON.

PETITION FOR WRITS OF HABEAS CORPUS AND CERTIORARI.

No. 13, Original. Argued January 6, 7, 1908.—Decided January 20, 1908.

The usual rule is that a prisoner cannot anticipate the regular course of proceedings having for their end to determine whether he shall be held or released by alleging want of jurisdiction and petitioning for a *habeas corpus;* and the same rule is applicable in the case of one committed for contempt until a small fine shall be paid for disobeying an injunction order of the Circuit Court, and who petitions for a *habeas* on the ground that the order disobeyed was void because issued in a suit which was *coram non judice.*

Notwithstanding the prohibitive provisions of § 720, Rev. Stat., the Circuit Court of the United States may have jurisdiction of a suit brought by a citizen of one State against citizens of another State to enjoin the execution of a judgment fraudulently entered against him in a state court which had no jurisdiction by reason of non-service of the summons, and this court will not determine the merits of such a case on *habeas corpus* proceedings brought by one of the defendants committed for contempt for disobeying a preliminary injunction order issued by the Circuit Court.

THE facts are stated in the opinion.

Mr. Henry L. Lazarus and *Mr. Louis Marshall* for petitioner:

The petitioner being restrained of his liberty by a United States marshal, under a judgment of the United States Circuit Court, which is claimed to be void, *habeas corpus* is the proper remedy to test the validity of the imprisonment.

The remedy of *habeas corpus* has been allowed in many instances of this nature. See *Ex parte Fisk*, 113 U. S. 713; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Wells*, 18 How. 307; *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Bain*, 121 U. S. 1; *In re Ayers*, 123 U. S. 443.

The preliminary injunction issued out of the United States Circuit Court, which restrained the proceedings of the petitioner in the Civil District Court of Louisiana, being in contravention of § 720, Rev. Stat., was a nullity, and its disregard by the petitioner does not constitute contempt. *Wayman* v. *Southard*, 10 Wheat. 1; *Leathe* v. *Thomas*, 97 Fed. Rep. 126; *Fenwick Hall Co.* v. *Old Saybrook*, 66 Fed. Rep. 389; *Haines* v. *Carpenter*, 91 U. S. 254; *Dial* v. *Reynolds*, 96 U. S. 340; *Sargent* v. *Helton*, 115 U. S. 348; *Moran* v. *Sturges*, 154 U. S. 267; *In re Chetwood*, 165 U. S. 443.

The allegations of fraud in this case are not supported by a single statement of fact and do not operate to repeal § 720 of the Revised Statutes of the United States.

The allegations are mere conclusions, a collection of epithets, and a series of *non sequiturs*. *Kent* v. *Lake Superior Ship Canal Co.*, 144 U. S. 75, 91.

A bill in chancery to set aside a judgment or decree of a court of competent jurisdiction on the ground of fraud, must state distinctly the particulars of the fraud, the names of the parties who were engaged in it, and the manner in which the court or the party was misled or imposed upon. *United States* v. *Atherton*, 102 U. S. 372; 9 Ency. Pl. & Pr. 684; *Brooks* v. *O'Hara*, 8 Fed. Rep. 532. See also *Knox County* v. *Harshman*, 133 U. S. 154; *White* v. *Crow*, 110 U. S. 184; 1 Black on Judgments, § 393; *Travelers' Association* v. *Gilbert*, 111 Fed. Rep. 269; 16 Am. & Eng. Ency. of Law (2d ed.), 374.

The *gravamen* of the bill here is that because the petitioner was willing to compromise at five thousand dollars, therefore the presentation of a larger amount through the regular legal channels constituted fraud.

Neither this fact, nor the suggestion that the petitioner's testimony was fraudulent or fictitious, is a sufficient ground for an independent suit in equity to set aside the judgment of the state court. *United States* v. *Throckmorton*, 98 U. S. 65, 69; *Steele* v. *Smelting Co.*, 106 U. S. 454; *Kimberly* v. *Arms*, 40 Fed. Rep. 558; *Kike* v. *Cohn*, 91 California, 134; *Andes* v.

Millard, 70 Fed. Rep. 517; *Mayor of New York* v. *Brady*, 115 N. Y. 615.

Mr. Harry H. Hall for respondent:

The Circuit Court of the United States for the Eastern District of Louisiana had jurisdiction to entertain and decide the suit in equity between the Southern Railway Company and Ephraim Simon and therefore, under the authorities, the writ of *habeas corpus* must be denied. *Ex parte Yarbrough*, 110 U. S. 651; *In re Frederick*, 149 U. S. 76; *Ex parte Terry*, 128 U. S. 302.

The judgment of the state court was an absolute nullity for want of citation. *Peterson* v. *Chicago Ry.*, 205 U. S. 390; *Green* v. *Chicago St. Ry.*, 205 U. S. 530; *St. Clair* v. *Cox*, 106 U. S. 350; *Pennoyer* v. *Neff*, 95 U. S. 727; *Scott* v. *McNeal*, 154 U. S. 34.

The United States Circuit Court has jurisdiction in a suit between the parties in interest, citizens of different States, claiming that the judgment obtained by one against the other is voidable for fraud practiced in obtaining it. *Johnson* v. *Waters*, 111 U. S. 667; *Cole* v. *Cunningham*, 133 U. S. 112; *Marshall* v. *Holmes*, 141 U. S. 596; *Terre Haute & I. R. Co.* v. *Peoria & P. U. R. Co.*, 82 Fed. Rep. 945; *National Surety Co.* v. *State Bank &c.*, 120 Fed. Rep. 593.

Mr. Justice Holmes delivered the opinion of the court.

The petitioner is in custody for contempt, he having violated a preliminary injunction issued by the Circuit Court of the United States. He brings this petition on the ground that the Circuit Court had no jurisdiction, and that therefore its decree might be disobeyed.

The jurisdiction of the Circuit Court over the cause depends on the allegations of the bill upon which the injunction was granted. That bill was brought by the Southern Railway Company against the petitioner. It alleges that Simon brought

a suit against the railway in Louisiana surreptitiously and without its knowledge, and that, on the suggestion that the railway was a foreign corporation doing business in the State without having named an agent to receive service, he served the citation upon the Assistant Secretary of State, whereas the railway was not a corporation doing business in the State, and the service was void. The suit proceeded to judgment for a fraudulently exaggerated sum, while the railway had no knowledge of the proceedings until after the judgment was rendered. As soon as it heard of it it began this suit; in effect to prevent the enforcement of the judgment, because unconscionable and fraudulently obtained upon a cause of action to which it has a good defense if allowed to present the same.

The bill further alleges that Simon will attempt to collect the fraudulent judgment by *fieri facias*, and prays as specific relief an injunction against his further proceeding under the same, but the general scope and purpose of the bill is what we have stated. A preliminary injunction was issued, after a hearing on affidavits, on June 30, 1905, and Simon appears to have obeyed the order for over two years. A demurrer to the bill was overruled in December, 1906, and a plea to the jurisdiction, filed in February, 1907, was overruled in the following May. Simon answered in August and issue was joined in the same month. The contempt seems to have occurred in November. It consisted in obtaining a writ of *fieri facias* and directing a levy and the service of garnishment process to collect the judgment. It was admitted at the argument that this method was adopted in order to obtain a summary disposition of the cause by this court instead of awaiting the result of a trial in the regular way. The punishment was a small fine, and the imprisonment was ordered only until the fine was paid.

The facts stated seem to us enough to dispose of this case The usual rule is that a prisoner cannot anticipate the regular course of proceedings having for their end to determine whether he shall be held or released, by alleging want of jurisdiction and petitioning for a *habeas corpus*. *United States* v. *Sing Tuck*,

194 U. S. 161, 168; *Riggins* v. *United States*, 199 U. S. 547; *Whitney* v. *Dick*, 202 U. S. 132, 140; *In re Lincoln*, 202 U. S. 178. In the present instance the release of the petitioner is not the primary issue of the case, to be sure, but it is so closely wrapped up with that issue that when it is apparent that the imprisonment is only nominal and has been incurred after two years' acquiescence, merely in order to secure a speedier hearing in this court, the analogy of the decisions is very close. The petitioner is in no position to demand this summary relief.

This is not a suit *coram non judice* and wholly void by reason of Rev. Stat. § 720, forbidding United States courts to stay by injunction proceedings in any state court. The Circuit Court had jurisdiction of the cause. That must be assumed at this stage, and finally unless we overrule the strong intimations in *Marshall* v. *Holmes*, 141 U. S. 589, and the earlier cases cited in that case. Even if the decision could have been put on a narrower ground, the ground adopted was that the Circuit Court had original jurisdiction of such a suit. It would be going far to say that, although the Circuit Court had power to grant relief by final decree, it had not power to preserve the rights of the parties until the final decree should be reached, or that an injunction continued in force under the authority of the United States, but originally issued by a state court, stood on stronger grounds than one granted by the United States court in the first place. Even if the order was erroneous, it would be going far to say that it was made without jurisdiction and might be disregarded, although the court had jurisdiction of the cause. See *United States* v. *Shipp*, 203 U. S. 563, 573. But without laying down a broader proposition than is required, we are of opinion that in the particular circumstances of this case *habeas corpus* is an extraordinary remedy, for which there has been shown no sufficient ground.

It is argued that the bill does not disclose facts that warrant going behind the judgment, but contains only vague allegations of fraud. But it alleges facts that show a total want of jurisdiction in the state court, and implies at least that the

fictitious service was made with deliberate fraud. Its general nature and purpose are clear. Enough is alleged to amend by, if amendment is necessary, and to give jurisdiction to the Circuit Court. As we cannot pronounce the whole proceeding void, we have nothing to do with the sufficiency of the pleading or the question whether the bill would be good or bad on demurrer. There was at least color of right for the preliminary order and it will be time enough to discuss the merits if the case comes here again after final decree.

Rule discharged.

Petition for habeas corpus denied.